# Supreme Court of the United States

October Term, 1971

No. 71-873

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United States of America, Appellant,

*v.*

Falstaff Brewing Corporation and Narragansett Brewing Company

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND*

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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|---|---|
| UNITED STATES OF AMERICA, PLAINTIFF, v. FALSTAFF BREWING CORPORATION AND NARRAGANSETT BREWING COMPANY, DEFENDANTS. | Civil Action No. 3523 |

RELEVANT DOCKET ENTRIES

| *Date* 1965 | |
|---|---|
| July 13 | Complaint filed. |
| | Plaintiff's Motion for Temporary Restraining Order filed. |
| | Plaintiff's Motion For Preliminary Injunction filed. |
| 14 | Hearing on Injunction held. William J. Elkins, Esq., (Dept. of Justice) Anti Trust Division, Washington, D.C. Presents Motions for Temporary Restraining Order and For Preliminary Injunction. Court to treat the instant matter as a hearing on Govt's motion For Preliminary Injunction. |
| | Court proceeds to decision. Motion denied. |
| | Motion For Preliminary Injunction filed. |
| 20 | ORDER entered and filed denying Pltff's motion for a preliminary injunction against Deft., Narragansett Brewing Company. |
| Aug. 3 | Defendants' Motion, Narragansett Brewing Company, to Dismiss the Complaint, etc. filed. |
| 9 | Answer of Defendant Falstaff Brewing Corporation filed. |
| 16 | Stipulation re Falstaff as subsidiary, etc. approved and filed. |
| Sept. 21 | Court grants summary judgment in behalf of Narragansett Brewing Company. |
| 22 | JUDGMENT entered and filed for Deft., Nar- |

| | | |
|---|---|---|
| | | ragansett Brewing Company and complaint is dismissed as to said Deft. |
| *1970* | | |
| Oct. | 6 | Case proceeds to trial. |
| | 7 | Trial continues. |
| | 8 | Trial continues. |
| | | Govt. Rests its affirmative case subject to rebuttal. |
| Oct. | 9 | Trial continues. |
| | 13 | Trial continues. |
| | 14 | Trial continues. |
| | | Deft. rests. No rebuttal. |
| *1971* | | |
| Oct. | 7 | Opinion filed. |
| | | JUDGMENT entered and filed in favor of Deft. Falstaff dismissing complaint. |
| Dec. | 3 | Notice of Appeal to the Supreme Court of the United States by the United States of America filed. |
| *1972* | | |
| Jan. | 11 | Deft-Appellee's Request to certify and transmit the record to the U.S. Supreme Court filed. |
| | 28 | Record on Appeal together with certified copy of docket entries mailed to Clerk, Supreme Court of the United States, Washington, D. C. |

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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|---|---|
| UNITED STATES OF AMERICA, PLAINTIFF, v. FALSTAFF BREWING CORPORATION AND NARRAGANSETT BREWING COMPANY, DEFENDANTS. | Civil Action No. 3523 Filed: July 13, 1965 |

## *COMPLAINT*

The United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the defendants, and complains and alleges as follows:

### I

### *JURISDICTION AND VENUE*

1. This complaint is filed and this action is instituted against the defendants under Section 15 of the Act of Congress of October 15, 1914, as amended, (15 U.S.C. § 25), commonly known as the Clayton Act, in order to prevent and restrain the violation, as hereinafter alleged, of Section 7 of said Act, (15 U.S.C. § 18).

2. Narragansett Brewing Company has an office, transacts business and is found within the District of Rhode Island.

### II

### *DEFENDANTS*

3. Falstaff Brewing Corporation (hereinafter referred to as Falstaff) is named a defendant herein. Falstaff is a corporation organized and existing under the laws of the State of Delaware, with its principal office located in St. Louis, Missouri.

4. Narragansett Brewing Company (hereinafter referred to as Narragansett) is named a defendant herein. Narragansett is a corporation organized and existing under the

laws of the State of Rhode Island, with its principal office located in Cranston, Rhode Island.

## III

## *TRADE AND COMMERCE*

5. The production of beer on a commercial scale was reinstituted in the United States on December 5, 1933, following the adoption of the twenty-first amendment to the Constitution. In the fiscal year ending June 30, 1935, there were 750 breweries operating in the United States producing 42,782,376 barrels of beer. Through merger, consolidation and natural attrition, the number of breweries has decreased so that by June 30, 1964 there were 204 breweries producing 103,017,915 barrels of beer annually. The share of beer sold by the top ten brewing firms in the United States has increased from 39.2 per cent of the market in 1951 to 56.8 per cent in 1963, while the share of the top twenty-five firms has increased from 57.5 per cent to 82.2 per cent.

6. Defendant Falstaff is the fourth largest brewing company in the nation in the terms of barrels sold. In 1964 Falstaff produced and sold 5,819,659 barrrels of beer which accounted for approximately 5.90 per cent of all beer sales in the United States. In 1964 Falstaff had sales of $139,464,822 and net earnings of $7,035,631. Its 1964 assets were $31,077,708. Falstaff currently produces but one brand of beer and that is sold under the trade name "Falstaff". It produces its beer in eight breweries which are located at Omaha, Nebraska; New Orleans, Louisiana; St. Louis, Missouri (2 breweries); San Jose, California; Fort Wayne, Indiana; Galveston, Texas; and El Paso, Texas. In the course of its business Falstaff produces beer in said breweries and sells substantial quantities of beer in interstate commerce.

7. Falstaff beer is presently distributed in 32 states and the District of Columbia. Falstaff beer is not currently distributed and sold in the northeast area of the United States.

8. Defendant Falstaff has steadily expanded its production, sales and marketing area through acquisitions of local and regional breweries. Since December 1952 it has acquired the following breweries on the dates indicated:

(a) Pacific Brewing & Malting Co. San Jose, California —December 1952

(b) Berghoff Brewing Co. Fort Wayne, Indiana—Leased in 1954 and purchased in 1964

(c) Galveston-Houston Breweries, Inc. Galveston, Texas —March 1956

(d) Mitchell Brewing Co. El Paso, Texas—April 1956

(e) Griesedieck Bros. Brewing Co. St. Louis, Missouri—December 1957

In addition, in June 1961 Falstaff acquired malting facilities from Albert Schwill & Company of Chicago, Illinois, and in May 1964 Falstaff acquired malting facilities from Columbia Malting Co. of Chicago, Illinois.

9. Sales figures in the New England market reflect the national concentration in the production of beer. In Massachusetts, for example, five companies account for over 60% of beer sales.

10. Defendant Narragansett is the largest seller of beer in the New England States with sales of 1,264,756 barrels accounting for about 21% of all New England beer sales. It is the twenty-first largest producer and seller of beer in the United States and accounts for approximately 1.29 per cent of all beer sold. The total dollar sales of defendant Narragansett in 1964 was $37,431,428 and its net income was $713,083. Its current assets are valued at $17,950,365. Narragansett owns and operates a brewery located in Cranston, Rhode Island. Narragansett markets its beer under the trade names "Narragansett", "Croft", "Hanley", "Krueger", "Ambassador" and "Haffenreffer". Defendant Narragansett in the course of its business produces beer in Rhode Island and sells substantial quantities of beer in interstate commerce, principally in the New England States.

11. Falstaff is a likely entrant and a potential competitor in the New England market. Furthermore, Falstaff is the most substantial and probable of the potential entrants into the concentrated New England market.

## IV

## *OFFENSE CHARGED*

12. On May 26, 1965, Narragansett and Falstaff executed a contract entitled, "Agreement Pursuant to Plan of Com-

plete Liquidation" under which Falstaff will acquire the assets of Narragansett and Narragansett will be liquidated on or about July 15, 1965. The agreement provides that Falstaff will pay Narragansett $17,500,000 cash and $2,000,000 in Falstaff common stock and will assume the debts and liabilities of Narragansett.

13. By this acquisition a substantial and likely entrant into a concentrated market acquires the leading company in that market. The effect of this acquisition may be substantially to lessen competition or to tend to create a monopoly in the production and sale of beer in the United States and within certain sections thereof, in violation of Section 7 of the Clayton Act, in the following ways, among others:

(a) Potential competition in the production and sale of beer between Falstaff and Narragansett will be eliminated;

(b) Potential competition in the production and sale of beer generally may be further substantially lessened;

(c) Industrywide concentration in the production and sale of beer in the United States will be further increased.

The offense alleged in this complaint will occur unless the relief hereinafter prayed for is granted.

*PRAYER*

WHEREFORE, plaintiff prays:

1. That the proposed acquisition described in paragraph 12 of this complaint be adjudged a violation of Section 7 of the Clayton Act.

2. That a temporary restraining order and a preliminary injunction issue enjoining the defendants, their officers, directors, agents, employees and all other persons acting on their behalf from taking any further action to consummate the acquisition agreement, or any similar agreement, understanding of plan, and from making any changes directly or indirectly with respect to the common stock or in respect to the corporate structure or properties of defendant Narragansett, pending adjudication of the merits of this complaint.

3. That defendant Falstaff be perpetually enjoined and restrained from acquiring, either directly or indirectly, any stock, assets or other interest in defendant Narragansett.

4. That defendant Narragansett be perpetually enjoined and restrained from transferring any stock, assets or other interest in Narragansett to defendant Falstaff.

5. That pursuant to Section 15 of the Clayton Act an order be made and entered herein requiring defendant Falstaff to be brought before this Court in this proceeding, and directing the Marshal of the Eastern District of Missouri to serve summons upon it.

6. That plaintiff have such other and further relief as the nature of the case may require and the Court may deem just and proper.

7. That plaintiff recover the costs of this action.

Dated:

NICHOLAS DEB. KATZENBACH
Attorney General

DONALD F. TURNER
Assistant Attorney General

GORDON B. SPIVACK

JOHN J. GALGAY
Attorneys, Dept. of Justice

RAYMOND J. PETTINE
United States Attorney

WILLIAM J. ELKINS
Attorney, Dept. of Justice

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

| | |
|---|---|
| UNITED STATES OF AMERICA, PLAINTIFF, v. FALSTAFF BREWING CORPORATION AND NARRAGANSETT BREWING COMPANY, DEFENDANTS. | Civil Action No. 3523 Filed: Aug. 9, 1965 |

## *ANSWER OF DEFENDANT FALSTAFF BREWING CORPORATION*

### *First Defense*

The Complaint fails to state a claim against this defendant on which relief can be granted.

### *Second Defense*

Answering the numbered paragraphs of the Complaint, this defendant says:

1. It admits that the Complaint purports to be filed and this action instituted under Section 15 of the Clayton Act to restrain what is alleged to be a violation of Section 7 of said Act but denies that the Complaint sets out any violation of said section and denies that this defendant committed any such violation.

2. It admits that Narragansett Brewing Company, the name of which is now Naiagans Incorporated, has an office in the District of Rhode Island and denies each and every other allegation of paragraph 2.

3. It admits the allegations of paragraph 3.

4. It admits the allegations of paragraph 4, except that it says that the name of Narrangansett Brewing Company is now Naiagans Incorporated.

5. It is without sufficient knowledge or information to form a belief as to the truth of the allegations of paragraph 5.

6. It admits the allegations of paragraph 6.

7. It admits the allegations of paragraph 7.

8. It admits that since December 1952 it has acquired brewery facilities from the companies and on or about the

dates set out in the second sentence of paragraph 8; that in June 1961 it acquired malting facilities from Albert Schwill & Co. of Chicago, Illinois; and that in May 1964 it acquired certain facilities from Columbia Malting Company of Chicago, Illinois but denies that said facilities were malting facilities and says that they were storage facilities which have been and are now used only as such by this defendant. It denies each and every other allegation of paragraph 8.

9. It has no information or knowledge sufficient to form a belief as to the turth of the allegations of paragraph 9.

10. It denies the allegations of paragraph 10.

11. It denies the allegations of paragraph 11.

12. It admits that on May 26, 1965 it executed a contract with Narragansett Brewing Company entitled "Agreement Pursuant to Plan of Complete Liquidation" and denies each and every other allegation of paragraph 12.

13. It denies each and every allegation of paragraph 13.

Wherefore this defendant prays that the Complaint be dismissed.

By its attorney
MATTHEW W. GORING
Hinckley, Allen, Salisbury & Parsons
2200 Industrial Bank Building
Providence, Rhode Island

Warren F. Farr
Ropes & Gray
50 Federal Street
Boston, Massachusetts
Of counsel

*CERTIFICATE*

August 9, 1965

I, Matthew W. Goring, attorney for all defendants herein, hereby certify that I have this day served the foregoing Answer by mailing a copy thereof, postage prepaid to Raymond J. Pettine, Esquire, the United States District Attorney for the District of Rhode Island, U. S. P. O. and Court House Building, Providence, Rhode Island, and to W. J. Elkins, Esquire, Department of Justice, Anti-Trust Division, Room 1706, Post Office Building, Boston, Massachusetts, the attorney of record for the plaintiff.

/s/ [Mathew W. Goring]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

| | |
|---|---|
| UNITED STATES OF AMERICA, PLAINTIFF, v. FALSTAFF BREWING CORPORATION AND NARRAGANSETT BREWING COMPANY, DEFENDANTS. | Civil Action No. 3523 Filed: Aug. 16, 1965 |

*STIPULATION*

Subject to the approval of the Court, plaintiff United States of America and defendant Falstaff Brewing Corporation ("FALSTAFF") hereby stipulate that unless otherwise ordered or permitted by this Court, FALSTAFF will:

1. Conduct the business acquired from defendant Narragansett Brewing Company, a Rhode Island corporation organized in 1891 ("NARRAGANSETT"), in a separate wholly-owned subsidiary of FALSTAFF;

2. Not permit such subsidiary to dispose of any plants, real estate, structures, equipment, or other physical capital assets acquired from NARRAGANSETT which are used in the conduct of its business, except in the ordinary course of such business;

3. Cause such subsidiary to use its best efforts to retain the system of distribution acquired from NARRAGANSETT in substantially its present form;

4. Cause such subsidiary to retain the brand name "Narragansett" and (subject to the terms of the License Agreements relating thereto) the brand names "Haffenreffer" and "Krueger", and to continue distributing beer under such brands in all areas wherein they are now sold in significant quantities;

5. Cause such subsidiary to use its best efforts to retain NARRAGANSETT'S normal volume of sales of beer under the brand names set forth in paragraph 4 above; and

6. As soon as such date has been decided upon, notify the plaintiff of the date on which it intends to begin production at any plants acquired from NARRAGANSETT of

any beer to be sold under brand names other than those acquired from NARRAGANSETT in competition with beer sold under brand names acquired from NARRAGANSETT.

FALSTAFF BREWING CORPORATION
By /s/ MATHEW W. GORING
UNITED STATES OF AMERICA
By /s/ JOHN J. GALGAY
Attorney, Department of Justice
By /s/ RAYMOND J. PETTINE
United States Attorney

Approved:
/s/ EDWARD W. DAY
United States District Judge
Dated: August 16, 1965

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA
*v.* C.A. No. 3523
FALSTAFF BREWING CORPORATION AND

Befor his Honor, Chief Judge Day
Tuesday, October 6, 1970

APPEARANCES:

For the Government: Philip F. Cody, Esq.
Bruce Repetto, Esq.
Kenneth A. Sagat, Esq.
Department of Justice
Antitrust Division

For the Defendant: Hinckley, Allen, Salisbury & Parsons; Matthew W. Goring, Esq. of counsel.
James McClellan, Esq. and
Jerome M. McLaughlin, Esq.
St. Louis, Missouri

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| *Government's Exhibits No.* | | *For iden.* | *In evid.* |
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| 1 | Copy of stipulation in Civil Action No. 3523, United States of America v. Falstaff Brewing Corporation | | 6 |
| 2 | Copy of interrogatories to be answered by Defendant, Falstaff Brewing Corporation and Answers by said Defendant, in Civil Action No. 3523, United States of America v. Falstaff Brewing Corporation | | 9 |
| 3(a) | Annual report of Falstaff, 1955 | | |
| (b) | " " " " 1960 | | |
| (c) | " " " " 1961 | | |

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| (e) | " " " " 1963 | | |
| (f) | " " " " 1964 | | 10 |
| 4 | Copy of letter to Mr. Philip F. Cody, Antitrust Division, U.S. Department of Justice, from Willson, Cunningham & McClellan, enclosing copy of agreement between Falstaff and Narragansett, dated May 26, 1965 and copy of instrument of conveyance, dated July 15, 1965 | | 14 |
| 5 | Copy of Falstaff Brewing Corporation Notice of Special Meeting of Stockholders and Proxy Statement, June 18, 1965 | | 15 |
| 6 | Copy of Supplemental Interrogatories to be answered by Defendant Falstaff Brewing Corporation and Answers by said Defendant, in Civil Action No. 3523, United States of America v. Falstaff Brewing Corporation | | 18 |
| 7 | Copy of article in ADVERTISING AGE, March 2, 1964, entitled "Falstaff to Launch $2,000,000 Drive in California March 2" | | 27 |
| 8 | Copy of document entitled "PROJECT 'X' Analysis Survey, February 26, 1962" | | 30 |
| 9 | Copies of letters from various distributors in New England to Falstaff Brewing Corporation, and replies by Falstaff Brewing Corporation, 1960–1965 | | 54 |
| 10 | Copy of report of Arthur D. Little, Inc. to Falstaff Brewing Corporation, dated April 12, 1960 | | 64 |
| 11 | Copy of press release from Falstaff Brewing Corporation, October 10, 1963 | | 88 |
| 12 | Falstaff Brewing Corporation press release, June 4, 1961 | | 114 |
| 13 | Copy of Summer 1961 edition of "The Falstaff Shield" | | 116 |

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*FIRST DAY*

*TUESDAY, OCTOBER 6, 1970*

*10:07 A.M.*

[17] THE CLERK: United States of America v. Falstaff Brewing Corporation.

MR. GORING: Ready.

THE COURT: You may proceed, gentlemen.

MR. JOHNSTON: If the Court please, for the record may I introduce to the Court the three attorneys from the Department of Justice who, I am sure, the Court has met previously, Mr. Philip Cody, Mr. Bruce Repetto, and Mr. Kenneth Sagat, who will try it on behalf of the United States Government?

MR. GORING: If the Court please, may I formally introduce to the Court my colleagues from the Bar of Missouri: Mr. James McClellan on my left, Mr. Jerome McLaughlin on my right? They are general counsel for the defendant.

THE COURT: Very well; you may proceed.

MR. CODY: Good morning, your Honor.

May I take perhaps one minute just to speak with defense counsel about a matter that came up just this moment?

THE COURT: Certainly.

(A pause)

[18] THE COURT: Go right ahead.

MR. CODY: Thank you, your Honor.

This case involves basically an alleged violation of Section 7 of the Clayton Act. It involves the acquisition by the fourth largest brewing corporation in the United States in 1964, the acquisition having taken place in 1965.

THE COURT: It took place in 1965?

MR. CODY: The acquiring corporation was a powerful—the Government will show this—and a resourceful brewer. It was probably the most potential competitor to so-called national brewers. Even though at the time it was a regional, it was the most likely to become a national. And the Government will also show that the corporation and its officers were aware of that fact. The acquired company, Narragansett, was the first largest—

THE COURT: Was what, please?

MR. CODY: First largest seller of beer in New England.

THE COURT: You mean the largest?

MR. CODY: It was No. 1.

THE COURT: In New England?

MR. CODY: Yes, sir. Now the crux of the offense charged in this complaint is that Falstaff, the defendant, was a potential competitor, the most potential entrant,—

THE COURT: Most potential?

MR. CODY:—into a concentrated industry. It had [19] shown constant growth in geographic expansion. It had demonstrated constant corporate interest over at least five years—

THE COURT: It had done what, demonstrated what?

MR. CODY: Corporate interest.

THE COURT: Corporate interest?

MR. CODY: Yes.—over at least five years in entering the Northeast, including New England. In fact, the Government's proof will demonstrate that Falstaff announced a gnawing desire to be a national seller. This was to meet the competition of national sellers whom they competed against in their own regions and also to achieve the advantages of being a national seller. So it was offensive and protective. Of the top ten brewers in the nation only three did not sell throughout the nation. We will be able to show that Falstaff of these three was the most potential.

The New England market was characterized by a high concentration of sales among a small number of brewers. We believe that in this type of situation a new entrant could have prompted competition. However, Falstaff did not choose to prompt competition. Falstaff set out to acquire a leading brewer in a concentrated market. It did not seek a toehold entry. It did not seek an entry by which it might have grown over a number of years in this market. [20] Instead, it sought to acquire the leading brewer in this market, a concentrated market. Falstaff, being the most likely entrant, was certainly the most likely source of pro competition in this market if it had entered in a way other than by acquiring the leading brewer in the market.

With that, your Honor, I should like to begin introducing our proof.

THE COURT: Very well.

MR. CODY: I believe jurisdiction and venue regarding

this action have been more or less settled by the pleadings and—

THE COURT: There is no question as to jurisdiction and venue, is there, Mr. Goring?

MR. GORING: Jurisdiction and venue are not challenged.

THE COURT: I thought not.

MR. CODY: Will it be necessary then, your Honor, to enter the complaint and answer as exhibits?

THE COURT: They are part of the case. They are already here. You mean as exhibits?

MR. CODY: Yes.

THE COURT: No, I think not.

MR. CODY: The line of commerce—

THE COURT: Line of commerce?

MR. CODY: Yes.—is a significant factor in a Section 7 case. In this particular case the line of commerce [21] has been stipulated to.

THE COURT: Stipulated?

MR. CODY: And that is simply the production of beer. In support of that I would offer to mark for identification an order filed 2/12/69—a stipulation; I am sorry—a stipulation filed 2/12/69 relating to the stipulation as to line of commerce and various other data.

THE COURT: You are offering it, as you say, as an exhibit for identification? Is that what you said?

MR. CODY: Yes, sir.

MR. GORING: That stipulation is a part of the official record, your Honor.

THE COURT: Let's mark it then as—it is in the record, is it, Mr. Goring?

MR. GORING: It should be.

THE COURT: Among the papers?

MR. GORING: It should be.

MR. CODY: If it is in the record, I will withdraw it.

THE COURT: If it is in the record, it need not be—Well, you can have it—Let it be marked as an exhibit, Exhibit 1. It will be clearly a matter of record.

MR. CODY: Government's Exhibit 1.

(Copy of stipulation in Civil Action No. 3523, United States of America v. Falstaff Brewing Corporation, marked Government's Exhibit 1)

MR. CODY: I would now like to offer Government's Exhibit 1 for identification—

THE COURT: It has been marked as a full exhibit.

MR. CODY: Oh, I see, your Honor. I understood perhaps we might have to mark it for identification first and for admission next.

THE COURT: No, I don't think so. We will do it in one fell stroke—A full exhibit.

MR. CODY: That cuts our time in half.

THE COURT: Beg your pardon?

MR. CODY: That cuts our time in half.

Falstaff was in the business of brewing beer before prohibition. I believe it was the first brewery to acquire a license to brew beer after the repeal of prohibition. It has over 31 years of brewing experience. And in 1964 it was sold not only in the United States but in 35 foreign markets as well.

THE COURT: Sold where, in what?

MR. CODY: In 35 foreign markets, your Honor.

THE COURT: I take it these are to be matters of proof.

MR. CODY: I will cite the proof.

THE COURT: What is that?

MR. CODY: I will cite the proof.

THE COURT: I understand you will offer evidence of these allegations, these statements you are making.

[23] MR. CODY: Yes, sir. I will cite them within one minute.

It was a distributor for a foreign beer in at least 30 states. Its management was aggressive. It was or it did consider itself as a front runner in the industry, an inventor in packaging, a leader in quality control, an effective advertiser, a researcher, and a developer of improved distribution practices. In short, Falstaff was by no means a stagnant company. It was a progressive corporation, fourth largest in its field in the nation.

In support of this I offer as Government's Exhibit 2 interrogatories filed November 10, 1965 and answers thereto.

MR. GORING: I believe those are part of the record.

THE COURT: Now, gentlemen, customarily in a trial of a case if it is sought to introduce interrogatories, the questions and answers are read into the record. But if you gentlemen want to stipulate that these interrogatories and the answers thereto may be offered by way of an exhibit which will make them a part of the record, I don't have any personal objection to it.

MR. GORING: I have no objection to doing it in that fashion, your Honor.

MR. CODY: No objection.

THE COURT: It will save unnecessary typing and loss of time. Let's mark that Exhibit 2.

[24] Those are dated November 10, 1965?

THE CLERK: Filed November 10, 1965, and answers thereto.

THE COURT: Very well.

(Copy of Interrogatories to be answered by Defendant, Falstaff Brewing Corporation and Answers by said Defendant, in Civil Action No. 3523, United States of America v. Falstaff Brewing Corporation, marked Government's Exhibit No. 2)

MR. CODY: In further support of our contentions we will introduce the 1955 annual report, 1960, 1961, 1962, '63, and '64 annual reports of the Falstaff Brewing Corporation.

THE COURT: Those reports are submitted to stockholders or to some agency, or what?

MR. CODY: They would be submitted, I assume, your Honor, to the Securities and Exchange Commission and to shareholders and would be made available to the general public through various outlets.

MR. GORING. That is correct.

THE COURT: There is no objection, I take it, Mr. Goring?

MR. GORING: None, your Honor.

[25] THE COURT: Exhibit 3.

MR. CODY: Will they be marked separately, your Honor?

THE CLERK: 1955, 3(a); 1960, 3(b); 1961, 3(c); 1962, 3(d); 1963, 3(e); and 1964, 3(f).

(Copies of annual reports of Falstaff Brewing Corporation for 1955, 1960, 1961, 1962, 1963, and 1964 marked Government's Exhibits 3(a), 3(b), 3(c), 3(d), 3(e) and 3(f), respectively)

MR. CODY: There are sections in each report relevant to each of the subjects that I have discussed, but to read them, I think,—

THE COURT: A little louder, please.

MR. CODY: —to read them would unduly burden the Court.

THE COURT. I don't want to read any more than I have

to. You can be sure of that. Are there any particular sections you want to specify?

MR. CODY: No, your Honor.

THE COURT: I will leave it to counsel to point out the pertinent sections before we finish here.

MR. CODY: I would rather they be considered in total.

THE COURT: They might be, but the time element is a factor here. I don't want to read surplusage. It would be of no help to me.

MR. CODY: In 1964 Falstaff had culminated or was in [26] the continuance of, shall I say, a growth of constant expansion in terms of plants, capacity, and sales? I believe our pre-trial brief shows that from 1960 through 1964 Falstaff's sales increased from 115.9 or so million dollars to about 139.4 million dollars. Its barrel sales had risen by nearly a million barrels.

THE COURT: That is in a period of five years?

MR. CODY: Yes, sir. Fortune magazine rated Falstaff as the 375th largest industrial corporation in terms of sales in the entire country. As I mentioned before, it was the fourth largest brewer. Its sales territory covered 32 states.

THE COURT: These are representations of facts which, I assume, will be supported by evidence.

MR. CODY: I will give citations for them momentarily, your Honor.

THE COURT: Very well, I just wanted to make certain you have evidence in support of these statements.

MR. CODY: Very good.

THE COURT: Or a stipulation by the parties as to their existence.

MR. CODY: Over the period its sales had increased 80 percent; its net earnings, by 51 percent; and its working capital, by 152 percent.

I will cite to your Honor in support of these statements [27] the 1961 report already in evidence as Government's Exhibit 3(c), pages 4 and 5; its 1964 report in evidence as 3(f)—

THE COURT: 3(a)?

MR. CODY: 3(f), your Honor. —particularly there is a 10-year summary in that annual report and that is more or less specifically what we are thinking about.

I would also cite to your Honor page 1 of that report,

3(f); also, to the stipulation in this action in evidence as Exhibit 1, paragraph 18 and paragraph 2.

In short, your Honor, Falstaff was not in any sense whatsoever—

THE COURT: Was not what, please?

MR. CODY:—in any sense whatsoever a failing company or even a company that was faltering. It was a growing aggressive regional brewer, eager to expand, as we shall show later.

MR. GORING: May I call the attention of the Government to the fact that at one point in the taking of depositions, which were taken by Mr. Farr, were taken by the Government attended by Mr. Farr in his lifetime, Mr. Farr conceded that this was not a failing company situation.

THE COURT: Who is Mr. Farr, your predecessor?

MR. GORING: Mr. Farr was counsel of record for Falstaff in the early stages of this case.

THE COURT: He is now deceased, I take it.

[28] MR. GORING: That is correct.

MR. CODY: I recall that, your Honor. But it was by no means a faltering corporation. It was a growing, expanding young corporation with, from what we have seen, excellent management and potential for growth. And as we will point out, that growth was, first of all, of a geographic nature; and, second of all, directed precisely to the Northeast and to New England.

And I would point out to the Court that New England has been stipulated to as a relevant geographic market in which to measure the effect of this acquisition, and that includes the states of Connecticut, Rhode Island, Massachusetts, Vermont, Maine, and New Hampshire.

In connection with the acquisition itself I would like to mark for identification—place into evidence a document covered by a letter from Willson, Cunningham & McClellan entitled "Agreement Pursuant to Plan of Complete Liquidation," and also an attached instrument of conveyance dated July 15, 1965, sent under the same cover.

MR. GORING: Refresh my recollection, Mr. Cody. That was one of the designated documents?

MR. CODY. Yes, it was.

MR. GORING. I have no objection to it being marked as a full exhibit.

THE COURT: It is entitled, for the record, "Agreement

[29] Pursuant to Plan of Complete Liquidation." Is that it? Does it bear a title, gentlemen?

THE CLERK: It is a letter of December 15, 1969, enclosing copy of agreement between Falstaff and Narragansett and copy of instrument of conveyance dated July 15, 1965.

THE COURT: It may be marked Government's 4.

MR. CODY: We have certain clips, your Honor.

THE COURT: I can't hear you.

MR. CODY: We have a master set where we have certain clips in them. By mistake I offered the clipped set.

THE COURT: Government's Exhibit 4.

(Copy of letter to Mr. Philip F. Cody, Antitrust Division, U.S. Department of Justice, from Willson, Cunningham & McClellan, enclosing copy of agreement between Falstaff and Narragansett, dated May 26, 1965 and copy of instrument of conveyance dated July 15, 1965, marked Government's Exhibit No. 4)

MR. CODY: We believe that the major harm in this acquisition comes not from Falstaff's entry into New England. Certainly in a concentrated market such an entry would be welcome. The question becomes how it enters. Innstead of taking alternatives Falstaff entered by acquiring the No. 1 brand in New England, the 21st largest brewer in the United States, a brand that had 65 percent of the Rhode Island [30] This again was not a case of a faltering company. Its dollar sales in 1960 were 26.4 million. These rose in 1964 to 38.3 million. Its barrel sales rose from less than 900,000 in 1960 to well over 1.2 million by 1964.

In support of this contention the Government cites the stipulation already entered in evidence as Government's Exhibit 1, paragraphs 1, 2, 3, 4, and 7. And it also cites in support of this the Falstaff Brewing Corporation notice of special meeting of Stockholders and proxy statement, dated June 18, 1969—1965; I am sorry—signed by Harry J. Pettey, Secretary, as Government's exhibit.

THE COURT: It may be marked Government's Exhibit 5.

(Copy of Falstaff Brewing Corporation Notice of Special Meeting of Stockholders and Proxy Statement, June 18, 1965, marked Government's Exhibit No. 5)

MR. CODY: In the same connection we will direct your Honor's attention to answer to interrogatory No. 11.

THE COURT: Answer to interrogatory No. 11?

MR. CODY: Correct. And also answers to supplemental interrogatories 1 and 2.

THE COURT: Are those likewise in evidence as part of the exhibit?

MR. CODY: Those are more or less statistical, your Honor.

[31] THE COURT: But I say are those questions and answers in evidence as exhibits as yet?

MR. CODY: No, I am sorry; they are not, your Honor. May I move that the answers of defendant Falstaff Brewing Corporation to supplemental interrogatories of the plaintiff—

MR. GORING: Mr. Cody, those two interrogatories and the answers thereto are a part of this record because I filed them myself.

MR. CODY: All right; if that is so stipulated.

THE COURT: They are in the pleadings of the case. But we did, did we not, permit you to file copies of other questions and answers as an exhibit, Exhibit 2?

MR. CODY: Yes, your Honor.

THE COURT: I think we ought to be consistent so when it comes time to go through the record of this case for the purpose of writing an opinion, I don't have to be searching everywhere. If we adopt a pattern, it seems to me we ought to follow it.

MR. CODY: All right; very good. I move that Government's supplemental interrogatories to be answered by the defendant in this action, dated 4/12/66, and the answers thereto,—

THE COURT: These are supplemental interrogatories you are talking about now?

MR. CODY: Yes, your Honor.

[32] THE COURT: Questions 1 and 2. What was the other one?

MR. CODY: 3, 4, and 7. I wonder, your Honor, would there be any objection to entering the entire interrogatories and answers as an exhibit?

MR. GORING: None whatever.

THE COURT: Government's Exhibit 6.

MR. CODY: By pointing out the particular interrogatories, your Honor, I only directed your attention to the most relevant ones. All, however, we believe are relevant and we

will rely upon them. So that is why I requested that the entire interrogatories and the answers thereto be taken as one piece of evidence.

THE COURT: Ordinarily pertinent parts of questions and answers to interrogatories are read into the record. But if there is no objection by counsel and you want to leave it that way, I will permit the introduction of the entire sets of interrogatories.

MR. GORING: I am indifferent on that point.

THE COURT: Very well; it may be marked Government's Exhibit 6.

(Copy of Supplemental Interrogatories to be Answered by Defendant Falstaff Brewing Corporation and Answers by said Defendant, in Civil Action No. 3523, United States of America v. [33] Falstaff Brewing Corporation, marked Government's Exhibit No. 6)

THE COURT: I take it in the memoranda the particular interrogatories and the answers thereto will be stressed by counsel.

MR. CODY: Yes, your Honor.

I would also for the record commend to your Honor's attention interrogatory 11, as well as the answers to supplemental interrogatories 1 and 2.

THE COURT: You have already done that, haven't you? My notes indicate—

MR. CODY: No, your Honor, I don't think I did.

THE COURT: My notes indicate a few minutes ago you called my attention to the answer to interrogatory No. 11. Then you referred to supplemental interrogatories Nos. 1, 2, 3, 4, and 7, and the answers thereto. Is this something additional?

MR. CODY: To set the record straight I meant to refer to stipulation 1 and 2.

THE COURT: Stipulation?

MR. CODY: Yes—which is Government's Exhibit 1.

THE COURT: Government's Exhibit 1.

MR. CODY.—3, 4, and 7.

THE COURT: You mean interrogatories 3, 4, and 7.

MR. CODY: No, sir; stipulation.

[34] THE COURT: Stipulation, Exhibit 1.

MR. CODY: Paragraphs 1, 2, 3, 4, and 7.

THE COURT: Oh, paragraphs. Very well. Paragraphs 1, 2, 3, 4, and 7 of stipulation marked Exhibit 1.

MR. CODY: Right. And answer to interrogatory, paragraph 11.

THE COURT: You mean answer 11. Paragraph 11?

MR. CODY: The answer, paragraph 11.

THE COURT: Answer to interrogatory No. 11.

MR. CODY: Yes, sir. And the answers to supplemental interrogatories 1 and 2.

I was wondering, your Honor, would it be favorable to the Court if we could take a five-minute break?

THE COURT: Do you feel it necessary? We have only been going an hour.

MR. CODY: It might help in the presentation to get our documents back in order.

THE COURT: We will take a five-minute break.

(RECESS)

MR. CODY: Your Honor, the Government intends to show at this point Falstaff's desire to become a national brewer, which desire necessarily intended that it enter New England. Falstaff had been shipping over 800 miles from New Orleans, its brewery in New Orleans, to parts of Florida;—

—

[35] THE COURT: New Orleans to parts of Florida?

MR. CODY: Yes, sir. —500 miles from Omaha to Denver and Cheyenne.

THE COURT: You mean it had another brewery in Omaha? From Omaha to Denver?

MR. CODY: —from Fort Wayne, Indiana, where it had a brewery, to Georgia.

New England was not sufficiently further from these points than from, let's say, its Fort Wayne, Indiana, brewery.

Falstaff also utilized computers to guarantee the efficiency of its cross-shipping.

THE COURT: Of its what?

MR. CODY: Shipping. In fact, in 1964 Miller Brewing Company, one of the top ten, competed in most areas of the nation, shipping from a single brewery in Milwaukee. That beer was sold in New England.

What we are discussing here are alternative methods of

entry by Falstaff into New England other than by the acquisition of the leading competitor in this area.

MR. GORING: Excuse me, Mr. Cody. I can't let that pass. They were not a competitor in New England at all.

THE COURT: What do you say to that?

MR. CODY: Very well; perhaps I did not make myself clear. The point that we are trying to make at this point [36] is that Falstaff had alternative methods to enter New England other than the acquisition of the leading brand.

THE COURT: In other words, you are saying because others shipped long distances into New England, it was open to Falstaff to do the self-same thing.

MR. CODY: And Falstaff had done the self-same thing.

THE COURT: Shipped into New England?

MR. CODY: No, shipped many miles; 800, 500,—

THE COURT: I appreciate that.

MR. CODY: Et cetera. In support of this we cite interrogatory No. 1 and the answer thereto, the 1961 annual report of Falstaff which is Government's Exhibit 3(c), page 3; the 1962 annual report of Falstaff which is Government's Exhibit 3(d), page 7;—

THE COURT: 3(b) or (d)?

MR. CODY: (d).

THE COURT: (d), isn't it?

MR. CODY: (d), your Honor.

THE COURT: Page what?

MR. CODY: Page 7, your Honor. —and Falstaff's annual report of 1963, 3(e) in evidence, page 5. We also cite from the deposition of Joseph Griesedieck.

THE COURT: Deposition of Joseph who?

MR. CODY: Griesedieck.

THE COURT: How do you spell that?

[37] MR. CODY: G-r-i-e-s-e-d-i-e-c-k. I believe it is stipulated that Mr. Griesedieck is and was from 1953 to date President of Falstaff Brewing Corporation.

MR. GORING: That is essentially correct. It is in the record. I am going to invite the Government's attention to the fact that Mr. Griesedieck is present in the courtroom available, if the Government chooses, to testify from this stand.

THE COURT: Very well.

MR. CODY: At page 28 of Mr. Griesedieck's deposition the second question was:

"Were you shipping from the Fort Wayne brewery to these Middle East, Eastern States, Ohio, Maryland, District of Columbia?"

Answer: "That's right."

Third question, same page:

"Was any other plant shipping beer into that area?"

Answer: "I don't think that area, particularly. I think they may have been shipping into some of the Florida, Georgia, markets. There may be times in the course of the summer when we're short of production at one plant where we have to cross-ship at a cost to us in freight." Page 62 of the same deposition Mr. Griesedieck [38] testified under oath:

"Q. Is there any, were there any beers shipped into the State of Florida which come from Fort Wayne?

"A. At certain times of the year, I think there is when they are short of capacity in New Orleans.

"Q. In other words, this is one of your cross shipping times, by cross shipping—

"A. Primarily because of the change in packages to the one can packages and in our capability in New Orleans, we haven't been able to keep pace with the requirement for canned package and to ship into Florida, which is primarily a can state, we had to ship in from other points at certain periods of the year, June, July, August.

"Q. Have you shipped from any other plants other than Fort Wayne on this cross shipping basis?

"A. Into Florida or generally?

"Q. Into Florida, I'm sorry.

"A. I think at certain times even when we were short in Fort Wayne, we have, on occasion, shipped from Galveston. I'm not sure. We may have shipped from St. Louis. We have to be constantly cross shipping, depending upon what the market requirements are."

[39] On page 67 of the same deposition, first question:

"What determination, who determines the final shipping points, a particular brewery?

"A. The computer does that.

"Q. Who approves the computer's findings? Is this the marketing vice-president?

"A. No, I don't think he gets into it. We have changed this around so many times, it's what we call a production

scheduling group and I can't remember who is the final determinant, frankly. I think it's a combination of production and traffic feed-in, put into the computers, sales requirements are fed in and the computer determines where it ought to be and I think at one time Mr. Gutting was scheduling it. We've got a change in the last year. I don't remember who is involved now."

But in any event I think this demonstrates that Falstaff's ability to ship long distances was very flexible.

I refer the Court's attention to page 97 of the same deposition where Mr. Griesedieck testified, in response to the third question on that page:

> "You say that currently that you are shipping Falstaff beer from the Narragansett plant to Virginia, did I hear you correctly?

[40] "A. As far as I know, we are. Yes, I'm sure we are.

"Q. Had you been shipping to Virginia prior to the Narragansett acquisition?

"A. That's correct."

As mentioned before, I think in this connection it should be noted that Miller was recognized as a national brand while it operated from a single brewery in Milwaukee.

Excuse me your Honor. In connection with the last deposition I read—the last designation—I should have read one more question and answer. And the question was:

> Were you again * * *"

THE COURT: Page 97?

MR. CODY: Yes, sir.

> "Were you again selling selected markets?"

Mr. Griesedieck's answer was:

> "I think we were selling the whole State of Virginia at that time."

Now as far as shipping as an alternative answer is concerned, advertising—

MR. GORING: I am sorry, Mr. Cody. I cannot hear you well.

THE COURT: I didn't hear the observation you started out with. In addition to what?

[41] MR. CODY: As far as shipping—

THE COURT: As far as shipping. Yes?

MR. CODY: —was an alternative method of entry—

THE COURT: In New England. Yes?

MR. CODY: —into New England, it should also be noted that Falstaff was an effective advertiser, one who could produce demands for its product. It had for years advertised the "Game of the Week."

THE COURT: "Game of the Week"?

MR. CODY: Yes, sir.

THE COURT: Meaning what?

MR. CODY: Baseball game on network television.

THE COURT: You mean it was the sponsor of a program?

MR. CODY: Correct. It had spent $2 million or thereabouts on an advertising campaign in California, and its ads were in national magazines such as TRUE, LOOK, and LIFE.

These facts, your Honor, will be amply supported by the advertising sections, which are set out in the annual reports of 1955 of Falstaff, which is Government's Exhibit 3(a); 1960, Government's Exhibit 3(b); 1961, Government's Exhibit 3(c); 1962, Government's Exhibit 3(d); 1963, Government's Exhibit 3(e); and 1964, Government's Exhibit 3(f), as well as the March 2nd, 1964 issue of ADVERTISING AGE entitled "Falstaff to Launch $2,000,000 Drive in [42] California March 2," which I offer as Government's Exhibit 7.

THE COURT: It may be marked Government's Exhibit 7.

(Copy of article in ADVERTISING AGE, March 2, 1964, entitled "Falstaff to Launch $2,000,000 Drive in California March 2" marked Government's Exhibit No. 7)

MR. CODY: I should also note that in 1962 a market study performed by Dancer-Fitzgerald in connection with Falstaff's negotiations with Liebmann—

THE COURT: How do you spell that?

MR. CODY: L-i-e-b-m-a-n-n. —Brewing Company shows that retailers in New York—and again this is in connection with shipping—showed that retailers in New York, New Jersey, and South Connecticut, where Falstaff wasn't doing any business, not selling any beer, thought of Falstaff as a premium beer. A popular-priced entry by Falstaff may have been significant as a marketing device. But,

nevertheless, at this point retailers in that area did know of Falstaff and they thought it was a premium beer.

MR. GORING: Mr. Cody, do I understand you offer that as an exhibit?

MR. CODY: Yes, I shall.

MR. GORING: You haven't offered it yet?

MR. CODY: No.

[43] MR. GORING: I might advise you I shall object on the ground of relevance.

MR. CODY: The Government offers an exhibit entitled "PROJECT 'X' Analysis and Survey, February 26, 1962," as Government's Exhibit 8.

MR. GORING: Is that the one you have just been talking about?

MR. CODY: Yes, it is.

MR. GORING: I object to it on the ground of relevance. It isn't shown that Liebmann had anything to do with New England. It isn't shown that any of the advertising materials he talked about, including a $2 million expenditure in California, has any relevance with respect to entry in the New England market.

MR. CODY: That is in evidence.

MR. GORING: I beg your pardon?

MR. CODY: The $2 million expenditure in California.

THE COURT: As it comes out of the ADVERTISING AGE?

MR. CODY: Yes.

MR. GORING: I am merely saying it is the same sort of thing.

THE COURT: Frankly, the situation in New York, New Jersey, South Connecticut, bears little relation in my opinion to the New England territory. I will sustain the objection. It may be marked merely as an exhibit for [44] identification.

THE CLERK: Government's 8 for identification.

MR. CODY: Your Honor, may I be heard on that?

THE COURT: You may be heard but I have ruled. I don't say you can't be heard.

MR. CODY: The Government intends to prove by the introduction of this evidence that Falstaff knew or at least had been informed of the fact that it had brand recognition in this area.

It is conceivable that the defendant may argue that it

could not enter the area because it was afraid that people would not purchase the beer simply because they didn't know about the brand. This seems to show that trade people did in fact know about the brand in this area. There was knowledge of it.

THE COURT: You are talking about another area. You are not talking about the New England area; you are talking about New York, New Jersey.

MR. CODY: We are talking about southern Connecticut.

THE COURT: Southern Connecticut.

MR. CODY: And it is also significant that it had this brand image in an area where it was not even selling beer.

THE COURT: That is a part of some survey that was made. The basis of the survey and who made it—

[45] MR. CODY: The survey was requested by Narragansett—Falstaff, rather.

THE COURT: I reiterate I don't see the relevancy of it at the moment. If something develops later that has a bearing on its relevancy, I will hear you again, but we will leave it as it is. It may be marked for identification only.

(Copy of document entitled "PROJECT 'X', Analysis and Survey, February 26, 1962," marked Government's Exhibit No. 8 for identification)

MR. CODY: May I make it clear for the record, your Honor, that the testimony concerning the offered document does show that Falstaff requested its preparation and accepted it? For that purpose may I read—

THE COURT: Read what?

MR. CODY: Several questions and answers from a deposition.

THE COURT: You are representing to the Court that the survey was requested by Falstaff. Is that it?

MR. CODY: Correct.

THE COURT: It doesn't change my ruling.

MR. CODY: Is that stipulated?

MR. GORING: I will concede the survey was requested by Falstaff. I will not make any concessions whatever as to the validity of the findings of these experts nor as to [46] the relevance of what they had to say even if valid.

THE COURT: I think your rights are fully preserved, Mr. Cody. Let's proceed.

MR. CODY: All right. On what I have covered, your

Honor, the last half an hour or so concerning alternative methods of entry, including shipping, there are various other depositions which may be read into the record and also several letters as well. With the Court's permission we will proceed to read them in.

THE COURT: Go ahead. That is why we are here.

MR. GORING: May I reserve the right which I have under the rules, particularly Rule 32, to put in—require the Government to put in or put in ourselves—any other portion of these depositions at the end of the series of deposition treatment.

THE COURT: Certainly I understood you gentlemen had stipulated rather than burden the court with the entire depositions, you would select pertinent parts. That applies to both sides.

MR. GORING: That is correct. So we shall read some portions of these depositions perhaps after all of the depositions being handled by the Government are in.

MR. CODY: After we close.

MR. GORING: Not necessarily.

MR. CODY: I was thinking, your Honor, it might be [47] best if that procedure was followed after we closed.

THE COURT: Let's present this case in orderly fashion. It might well be some review will be needed. I don't know just what you have in mind. Once you close, you have closed. You don't want to reopen the case. Presumably we are going to have a full and complete presentation of what ever it is the parties desire to present during this trial, not after the end of the trial. I don't quite follow your approach here, frankly.

MR. CODY: All right; very well.

MR. REPETTO: Your Honor, in accordance with the point that Falstaff could have shipped into New England, I would like to read—

THE COURT: You would like to read what?

MR. REPETTO: I would like to read paragraph 3 or answer 3 of the interrogatory which has been designated Government's Exhibit 2.

THE COURT: Exhibit 2. You are reading interrogatory No. 3.

MR. REPETTO: Answer 3.

THE COURT: Oughtn't we have the interrogatory and the

answer? It seems to me that is the orderly way of presenting it.

MR. REPETTO: The question in the interrogatory 3: [48] "List the states in which Falstaff sold its beer as of January for each year from 1950 to 1965, * * *"

THE COURT: For each year, 1950—

MR. REPETTO: To 1965.

THE COURT: January of 1965, I suppose.

MR. REPETTO: "* * * to 1965," it reads.

"* * * and designate for each such time which brewery served which states."

The answer 3 reads as follows:

Following are the various States in which Falstaff sold Falstaff beer as of January for each year from 1950 to 1965. The plant or plants which were the principal suppliers of such States are shown:

"*ALABAMA*

Served entire period.

Principal supplier—New Orleans."

THE COURT: What is that, please: Principal supplier?

MR. REPETTO: New Orleans.

"*ALASKA*

Entered market in 1965

Principal supplier—San Jose."

It doesn't list "California" but—

MR. GORING: I will agree.

[49] THE COURT: I think we can agree on that, can't we?

MR. REPETTO:

"*ARIZONA*

Entered market in 1956.

Principal supplier—El Paso.

"*ARKANSAS*

Served entire period.

Principal supplier—St. Louis.

"*CALIFORNIA*

Entered market 1952.

Principal supplier—San Jose.

"*COLORADO*

Served entire period.

Principal supplier—Omaha.

"*DISTRICT OF COLUMBIA*
Entered market in 1962.
Principal supplier—Fort Wayne.

"*FLORIDA*
Served entire period.
Principal supplier—New Orleans.

"*GEORGIA*
Served since 1953.
Principal supplier—New Orleans, subsequently Fort Wayne following acquisition and remodeling.

[50] "*HAWAII*
Entered market in 1954.
Principal supplier—San Jose.

"*ILLINOIS*
Served entire period.
Principal supplier—St. Louis.

"*INDIANA*
Some sales made in Indiana in 1953, but market opened in 1954.
Principal supplier—Fort Wayne.

"*IOWA*
Served entire period.
Principal supplier—Omaha.

"*KANSAS*
Entered market in 1953.
Principal supplier—Omaha.

"*KENTUCKY*
Served entire period.
Principal supplier—St. Louis.

"*LOUISIANA*
Served entire period.
Principal supplier—New Orleans.

"*MARYLAND*
Entered market in 1965.
Principal supplier—Fort Wayne.

[51] "*MICHIGAN*
Entered market in 1954.
Principal supplier—Fort Wayne.

*"MISSISSIPPI*
Served entire period.
Principal supplier—New Orleans.

*"MISSOURI*
Served entire period.
Principal supplier—St. Louis.

*"NEBRASKA*
Served entire period.
Principal supplier—Omaha.

*"NEVADA*
Entered market in 1954.
Principal supplier—San Jose.

*"NEW MEXICO*
Entered small portion of market in 1954, but more extensively in 1956 upon acquisition of El Paso plant.
Principal supplier—El Paso.

*"NORTH CAROLINA*
Entered market in 1961.
Principal supplier—Fort Wayne.

*"OHIO*
Entered market in 1954.
Principal supplier—Fort Wayne.

*"OKLAHOMA*
Served entire period.
Principal supplier—Omaha

*"SOUTH CAROLINA*
Entered market in 1960.
Principal supplier—Fort Wayne.

*"SOUTH DAKOTA*
Served entire period in very small way.
Principal supplier—Omaha.

*"TENNESSEE*
Served entire period.
Principal supplier—St. Louis.

*"TEXAS*
Served entire period.
Principal supplier—Galveston.

"*VIRGINIA*
Entered market in 1963.
Principal supplier—Fort Wayne.
"*WEST VIRGINIA*
Entered market in 1963.
Principal supplier—Fort Wayne.
"*WYOMING*
Served entire period in very small way.
Principal supplier—Omaha."

Your Honor, I would like to read from the deposition of [53] Karl K. Vollmer.

THE COURT: How do you spell that last name?

MR. REPETTO: V-o-l-l-m-e-r. And, if I could, I would like to read some of the introductory material to show his position with the company.

THE COURT: I think you should. Go ahead.

MR. REPETTO: Page 2; questions 1, 2, 3, and 4.

"Q. Mr. Vollmer, would you please tell us by whom you are employed?

"A. Now?

"Q. Yes, now."

THE COURT: When was this taken, by the way?

MR. REPETTO: This was taken—

MR. GORING: April 28, 1967.

MR. REPETTO: That is correct, your Honor. Taken in St. Louis.

THE COURT: In St. Louis?

MR. REPETTO: Yes, sir. I repeat the second question.

"Q. Yes, now.

"A. I'm now on a purely consulting basis for Falstaff.

"Q. And how long have you been on a consulting basis for Falstaff?

"A. Two, three months—three months since the first of the year.

[54] "Q. Would you tell us when did you join Falstaff?

"A. 1948.

"Q. Would you tell us between 1948 and the period when you became a consulting person for Falstaff what you have done in the meantime?"

I am now on page 3.

"A. I came to Falstaff as a market, heading their now Market Research Department. I was in that about eight to

nine months and I was asked to become the advertising director of Falstaff. Then after about a year I became Director of Marketing."

Page 3. I will read questions 1, 2, 3, 4, 5 and 6, 7, 8, and the answers thereto.

THE COURT: It is my understanding that the witness went to Falstaff first in 1948 and eventually became Director of Marketing. Is that the gist of it?

MR. REPETTO: Yes, your Honor.

THE COURT: Now you are reading where?

MR. REPETTO: Page 3, questions 1 through 8. The last answer was:

"Then after about a year I became Director of Marketing.

"Q. Is that about 1950?

"A. Fifty-one, I would say.

[55] "Q. What happened after that?

"A. Well, after that I was the head of the Marketing Department until 1959 and then was asked to head the Planning Department and relinquish my activities as marketing director to Mr. Alvin Griesedieck.

"Q. And then from 1959 until approximately two months ago you have been in the Planning Department?

"A. Correct.

"Q. Now, were you the head of the Planning Department?

"A. The Planning Department consisted of me.

"Q. And what was your title in that capacity?

"A. Director of planning.

"Q. Director of planning?

"A. And Vice President.

"Q. Did I understand you to mean then that you had no one working directly under you?

"A. No.

"Q. No. To whom did you report?

"A. Mr. Joseph Griesedieck, President."

I am now on page 4. I will go through questions 1 through 5.

"Q. I should have asked you, Mr. Vollmer, at the outset if you would just state your name for us and your home address so we have that.

[56] "A. Karl, K-a-r-l, K. Vollmer, V like in Victor, o-l-l-m-e-r; 4931 Lindell Boulevard.

"MR. FARB: Is that St. Louis:

"THE WITNESS: St. Louis.

"Q. Mr. Vollmer, can you tell us whether you are familiar with the term 'national brewer'?

"A. Certainly.

"Q. Would you tell us who are the national brewers in this country?

"A. Anheuser-Busch, Schlitz, Pabst, Miller's."

THE COURT: He is testifying as of 1967. Is that correct?

MR. GORING: That is correct, your Honor.

THE COURT: Go ahead.

MR. REPETTO:

"Q. Are you familiar with the term 'regional brewer'?

"A. Yes.

"Q. Would you tell us who are the large regional brewers in this country?

"A. Hamm's, Carling's, Coors, Falstaff, • • •"

THE COURT: Just a little slower.

MR. REPETTO:

"A. Hamm's, Carling's, Coors, Falstaff, probably National Bohemian."

[57] I now read from page 47 of Mr. Vollmer's deposition; questions 5, 6, 7, and 8.

MR. GORING: Page what?

MR. REPETTO: Page 47.

"Q. Was—Is the Fort Wayne operation considered by Falstaff to be a sound part of the Falstaff structure?

"A. Well, we've had to reorient our thinking on that, and it's been used to a great extent as a shipping plant now for some remote areas that we can't, that need additional products from our other existing plants, or wherever we run short of product there, why, we fill in from Fort Wayne and, of course, we shipped from there to the southeast, too.

"Q. You are shipping to the southeast—

"A. Yes.

"Q. —now from Fort Wayne?

"A. Yes.

"Q. I was interested in the leasing situation with an ultimate buying option which I believe was the means of purchasing the Fort Wayne Plant; is that correct?

"A. Yes."

Now, if I may, I would like to read from Joseph Griesedieck's [58] deposition, page 19.

THE COURT: Give me that again.

MR. REPETTO: Joseph Griesedieck.

THE COURT: How do you sell that?

Mr. REPETTO: G-r-i-e-s-e-d-i-e-c-k.

THE COURT: He is the President of Falstaff?

Mr. REPETTO: He is the President of Falstaff. He has been referred to already, your Honor.

THE COURT: You are reading his deposition? What page?

MR. REPETTO: Page 19, question 1,

"Is there a particular plan you follow as to whether or not you want to be regional brewers or have breweries in a regional area and ship within a particular area, or do you believe in shipping from one point to a national market?

"A. Initially back in the thirties when we first started, we, because of our weak financial situation, we felt that we had to—in fact, we pioneered the idea of regional breweries to enable us to compete at a popular price because of the high freight costs. This industry has changed considerably in those years and a larger percentage of the business is sold as a one-way package and freight is not as important [59] as it used to be. By and large, our policy has been to develop a marketing area and then, where possible, develop production facilities to service that area more economically."

I would now like to read from page 30, questions 3 and 4 of Joseph Griesedieck's deposition.

"Q. Could Falstaff ship from Fort Wayne to Pennsylvania?

"A. I presume they could.

"Q Where would you say, sir, that the point would be reached where it would be non-feasible or unfeasible for Falstaff to ship from the Fort Wayne plant into the Northeastern part of the United States?

"A. I couldn't answer that without checking the Traffic Department. It's pretty hard to generalize on that. We would not, in that market, ship out of the Fort Wayne, I can assure you. We might have shipped out of there if we knew we had a potential to acquire capacity at some point but not just to open a market."

I would now like to read from page 37, question 2, of Joseph Griesedieck's deposition.

"Q. What would a new brewer [60] entering the New England market need in order to acquire an effective wholesale distribution system?

"A. Well, you'd have to be prepared to offer that wholesaler a marketing plan which would convince him that he could sell a sufficient amount of your product to make money. He'd also have to be available to you, which is the primary problem, as we see it, in New England. One of two or several reasons he might not be interested is because they already have other products; primarily I think he'd be interested in knowing that you were prepared to spend the kind of money in a marketing operation that will produce results for him and secondly that he can buy the product at a price where he would have the proper mark-up to make a profit. These are two factors and then, of course, the reputation of the brand, itself, would be an important factor." This, your Honor, is one of the reason that we sought to introduce the marketing survey done by Dancer, Fitzgerald to show that Falstaff had brand recognition in a market where it was not selling because Mr. Griesedieck does specify that this is one consideration that he must have to enter a market. Where it is granted that the market [61] is not New York, New Jersey, or Connecticut, it is sufficiently close to New England and it is of such a nature, being a market that is important and a market that Falstaff does not sell in, that is what we sought to introduce that survey for.

I would now like to read from page 80, question 4, and page 81, questions 1, 2, and 3 of Joseph Griesedieck's deposition.

"Q. In the past, has it been Falstaff's program that since 1955 to enter a market slowly and expand?

"A. You are referring to a new market?

"Q. Yes.

"A. Basically that's correct.

"Q. Generally, what do you do, establish a demand for your products from the existing plant, then when you build that demand to a certain level you seek a brewery within that area?

"A. Generally, yes, that's been our past history.

"Q. At the time you acquired Fort Wayne or you acquired the lease * * *"

THE COURT: From what page are you reading now, 81?

MR. REPETTO: I was continuing, your Honor. This is page 81, question 3.

[62] "At the time you acquired Fort Wayne or you acquired the lease on Fort Wayne, I believe you stated that at that time in that area you had demand for your product?

"A. Yes, in a general area, not all the market we subsequently opened, though."

I would now like to read from page 86, question 2 of Joseph Griesedieck's deposition.

"Q. What was the basic reasoning behind the decision to go into New England as a premium beer?

"A. Primarily the fact that it appeared to us that the premium priced brands were the ones that were showing the greatest gains and that we should have that margin and our distributors needed that margin to develop the proper degree of distribution. As I pointed out earlier, in the last several years, this whole pattern changed. The premium priced beers were showing the greatest gains. It was obvious to us the public was willing to pay the price. As a new brand coming into the area, we felt we should approach it on that basis. If we were unsuccessful, we always had the possibility of reducing the price. Once you go in at a popular price, it's impossible to raise it. That was the basic [63] reason behind the decision."

I would now like to read page 90, question 1 of Joseph Griesedieck's deposition.

"Q. Was there any discussion at that time of shipping any of that beer brewed at Fort Wayne into the Northeast?

"A. No, not on any permanent basis. We might have done it until, as I say, the plant up there was ready to produce certain packages, but not as a permanent move."

I would like to now read from supplemental interrogatories and answers thereto questions 3 and 4. That is Exhibit 6.

THE COURT: Exhibit 6; interrogatories 3 and 4 and the answers thereto.

MR. REPETTO: I will read both questions because they are both related. Question 3:

"State whether Falstaff maintained a prospective distributor file for any of the States in the Northeast and, if so, state as to each, the date when Falstaff first began to maintain each such file."

Question 4:

"As to each prospective distributor file listed in response to supplemental interrogatory 3 above, identify, by name and title, the [64] person or persons who caused each such file to be established."

Answers 3 and 4 are grouped together.

THE COURT: Grouped together?

MR. REPETTO: Yes, your Honor.

THE COURT: One answer, you mean?

MR. REPETTO: Yes, your Honor.

THE COURT: Very well.

MR. REPETTO:

"Defendant has for many years maintained files to contain inquiries received from persons wishing to become distributors of its product and copies of the replies made thereto. These inquiries have been received not only from persons in the United States, but throughout the world. As to inquiries received from persons in the United States, including the 'Northeast' states, the files are maintained on a state basis. The defendant's records do not disclose when this filing procedure was established or by whom. It has, however, been in existence for at least 25 years. Specifically, a separate file for each state, including each state in the 'Northeast' was maintained during that period."

[65] I wish, your Honor, to introduce into evidence and have marked as an exhibit the distributor letters forwarded to the Government, pursuant to a c.i.d., by the defendant Falstaff.

THE COURT: Distributor letters forwarded to the Government. What is the balance of that description?

MR. REPETTO: Pursuant to a c.i.d.

THE COURT: Pursuant to what?

MR. REPETTO: C.i.d., civil investigative demand.

THE COURT: Civil investigative demand?

MR. REPETTO: Yes, your Honor.

THE COURT: Made when? Does it bear any date?

MR. GORING: January 1965, your Honor.

THE COURT: Is that correct?

MR. GORING: Yes, your Honor.

MR. GORING: I am going to object to these unless there is some showing of their relevance. They apparently are letters from people who had some interest in becoming—

THE COURT: I haven't seen the documents. Have you seen the documents? I haven't.

MR. GORING: I have, yes. The fact that somebody expressed an interest in distributing the product, standing by itself, has no significance to me.

THE COURT: I think it might have some relevance on the question of whether or not there was any demand in the [66] New England market or any interest shown in the New England market for the product of the defendant. Is that your theory?

MR. CODY: Yes, it is, your Honor.

THE COURT: This is a file kept in the regular course of business of Falstaff?

MR. CODY: Yes, it is, your Honor, according to their interrogatories.

I would take this opportunity also to reiterate that I think the brand recognition survey, which your Honor marked for identification but refused to put in evidence,—

THE COURT: Let's forget that.

MR. CODY: —has the same bearing.

THE COURT: Let's forget that for the moment and direct ourselves to what we have before us here.

MR. CODY: Very well. I think they are very relevant. They do show an interest in distributing and selling Falstaff beer in New England,—

THE COURT: Am I to understand that—

MR. CODY: —on both parties' parts.

THE COURT: —pursuant to this so-called civil investigative demand the defendant Falstaff furnished this information that you are offering here?

MR. CODY: Yes, your Honor. It is similar to a subpoena.

[67] THE COURT: Similar to a subpoena. In other words, the various documents included in this exhibit, or the originals thereof, were in the possession of the defendant Falstaff.

MR. CODY: Yes.

THE COURT: And were furnished to your department pursuant to this so-called civil investigative demand. Is that it?

MR. CODY: Yes, sir.

THE COURT: I haven't examined the contents, obviously. The top letter would seem to indicate it has a bearing on distribution or sale in the New England area. Suppose you show them to Mr. Goring if he hasn't seen them. I don't know how he can object on the ground of relevance if he hasn't seen them.

MR. GORING: I have seen those letters.

THE COURT: You have seen them?

MR. GORING: Yes, indeed. They were furnished prior to the beginning of this suit under an extra-judicial process which is known as a civil investigative demand, and it is as compulsory as a subpoena. The fact, however, they were produced has no bearing on their relevance or their position in this case. All they show is an expressed interest on the part of a heterogeneous bunch of unidentified people in selling Narragansett beer.

[68] MR. CODY: I will have to object to that. These people are identified. If Mr. Goring wanted to check out their identification—

THE COURT: I think your objection, Mr. Goring, goes to the weight to be given to these documents rather than their admissibility. Your objection to the Court's ruling is noted. They may be marked Exhibit 9.

MR. REPETTO: I would like to point out there are approximately 30 letters from distributors in the six New England states, and as part of that exhibit are the replies where replies were made to those distributors, which verifies the answer to the interrogatory that these were kept in the regular course of business and that replies were made thereto for approximately 25 years. The relevance of this is—

THE COURT: How far back do these communications extend?

MR. REPETTO: The ones that we have here go back to 1960. They cover the period 1960 through 1965. The relevance here is that in the deposition that I read of Mr. Joseph Griesedieck one of the factors he pointed out in getting into a new market, particularly New England, is the availability of distribution and the need to get distributors.

On the face of these documents it appears that they [68] were not solicited by Falstaff but were spontaneous inquiries by distributors in the New England market.

THE COURT: I have already ruled they may be marked as an exhibit. I need no further argument on the area of relevancy. The weight to be given to them is something else.

(Copies of letters from various distributors in New England to Falstaff Brewing Corporation, and replies by Falstaff Brewing Corporation, 1960-1965, marked Government's Exhibit No. 9)

MR. CODY: At the expense of being repetitious, your Honor, I would like to say one more time that if we take the distributor letters in conjunction with the brand recognition survey, there is a relationship because—

THE COURT: Mr. Cody, how many times do I have to tell you that the Court has already ruled on the admissibility of that proffered exhibit? At the proper time if you want to argue it again, I will listen to you. We are not getting anywhere. Let's proceed. When the Court rules, the Court assumes full responsibility for its ruling.

MR. CODY: Very well, your Honor.

MR. REPETTO: Continuing further, your Honor, with the alternative methods that New England possibly could have been entered in relation to building a brewery in the New England market, I would first like to read from [70] Harvey Beffa, Sr.'s deposition.

THE COURT: Harvey—

MR. REPETTO: Beffa—B-e-f-f-a.

THE COURT: Taken when?

MR. REPETTO: Taken April 27, 1967 in St. Louis. I will first read some introductory material to show Mr. Beffa's position with Falstaff. First I would like to read from page 2, questions 1, 3, and 4; page 3, 1 through 7; and page 4, question 1.

"Q. Sir, would you state your full name, please?

"A. Harvey Beffa, Sr.

"Q. Would you state your current employer?

"A. Falstaff Brewing Corporation.

"Q. And your position with Falstaff today?

"A. Executive vice president, chairman of the board.

"Q. And for how long a period of time have you held those positions?

"A. Executive vice president, '53; chairman of the board '61, I think.

"Q. Could you please state as briefly as possible the functions and responsibilities commensurate with your position as executive vice president?

"A. Yes, sir. The operations report to me, purchasing, personnel, and research and development.

"Q. As to the research and development department, [71] is this basically in connection with the brewing?

"A. It's in connection with the product.

"Q. This research and development department would not deal in any way with marketing or market expansion?

"A. No, sir.

"Q. And the operations division, this deals mainly with the operation of the plants?

"A. That's true, sir.

"Q. Do you recall the date when you first became a member of the board of directors?

"A. 1936, I think it was.

"Q. And are you a member of the executive committee?

"A. I am.

"Q. And do you recall the first year when you became a member of that committee, approximately?

"A. Must have been the late '40's, I suspect, somewhere in there."

THE COURT: In the late '40's he became a member of what committee?

MR. REPETTO: The executive committee.

THE COURT: In the late '40's.

MR. REPETTO: I would now like to read from page 19, questions 5 and 6; and page 20, question 3.

[72] "Q. Is there a particular reason why Falstaff has never built a brewery?

"A. Falstaff did not necessarily have to build a brewery. It got its acquisitions, or rather developments by acquisitions.

"Q. Beyond the fact that they—the history shows that their breweries have all been acquired, is there a particular reason why they could not build a brewery?

"MR. FARR: I object to the question. There is nothing to indicate that Falstaff could not have built a brewery.

"Mr. Canty: That's what I'm trying to establish, whether there was any reason why they could not.

"The Witness: Your question again, please?

"(Whereupon, the previous question was read by the reporter.)

"The Witness: Why, I guess they could build anything they wanted to build. Obviously, of course, finances and the economic situation, the pro's and con's have all got to be added up, would be my answer to you.

"Q. To your knowledge has Falstaff ever been denied financing?

"A. Not that I know of."

[73] I would now like to read from the deposition of Ferd Gutting. The deposition was taken the first day of May 1967—was taken in St. Louis, Missouri. Again I would like to read introductory material showing Mr. Gutting's position. I will read from page 2, question 1; page 3, questions 1 through 9; page 4, question 1; page 5, questions 3, 4; page 6, question 1.

"Q. Sir, would you state your full name, please?

"A. Ferd J. Gutting.

"Q. And your current address?

"A. No. 4 Meadow Acres, Ladue, Missouri.

"Q. Would you state, please, your current employer?

"A. Falstaff Brewing Corporation.

"Q. Tell us, please, your position with Falstaff at this time?

"A. Vice President, planning."

The Court: Vice president of plant?

Mr. Repetto: Planning.

"Q. For how long a period of time have you been vice president in charge of planning?

"A. One week today.

"Q. Prior to that time, your position with Falstaff, immediately prior?

"A. Assistant treasurer.

"Q. And for what period of time were you assistant [74] treasurer?

"A. April 1964 to last Monday.

"Q. Prior to April 1964, your position with Falstaff was what?

"A. Special project coordinator in the finance department.

"Q. For how long a period of time did you hold that position with Falstaff?

"A. From January 1, 1958 until about a week ago.

"Q. In other words, until a week ago your duties as special project coordinator coincided with your job as assistant treasurer?

"A. That's correct.

"Q. You held both positions?

"A. Yes.

"Q. During the time when you were special project coordinator, and I believe you said assistant treasurer of finance—

"A. Yes.

"Q. Was it a part of your duties to study possible plant sites for future buildings of plants, or breweries by Falstaff?

"A. Yes.

"Q. Was it also a part of your duties in that capacity to examine possible plants or breweries that might be acquired by Falstaff?

"A. Yes."

[75] I would now like to read from Mr. Gutting's deposition, page 36, question 1; page 37, questions 3 and 4; and page 38, questions 1, 2, and 3.

"Q. Was it planned at the time * * * "

THE COURT: This is page 36, question 1?

MR. REPETTO: Yes, your Honor.

"Was it planned at the time that you made this projection that Falstaff beer would be brewed in the Narragansett plant and shipped to existing Falstaff markets?

"A. Yes, this was a distinct possibility.

"Q. At the time that you placed this figure of 50,000 barrels on this sheet, * * * "

THE COURT: A little slower, please. I didn't get that. At the time what?

MR. REPETTO:

"At the time that you placed this figure of 50,000 barrels on this sheet, had you had any discussions with Falstaff

management as to the shipping of Falstaff beer brewed at Narragansett outside the New England area?

"A. Yes, there were such discussions.

"Q. With whom did you have such discussions?

"A. Well, again, I don't remember specifically but in all probability Mr. Joseph Griesedieck, Mr. Harvey Beffa, Mr. Wemhoerner.

"Q. And what areas were discussed by you with [76] these other people as to where you would ship Falstaff brewed in Narragansett plants?

"A. I don't recall very much discussion on the subject, other than the possibility that any excess capacity at the Narragansett plant could be used to supply beer to the East Coast Falstaff distributors, for example.

"Q. Now, I ask you what does an East Coast distributor mean to Falstaff people, or to you, in particular?

"A. Oh, it means Baltimore, Maryland; Washington, D.C.; Virginia; North Carolina.

"Q. This is the East Coast as a sales region of Falstaff, is that true?

"A. Yes."

I would like to again read from the deposition of Joseph Griesedieck, page 84.

THE COURT: Joseph G-r-—

MR. REPETTO: —i-e-s-e-d-i-e-c-k.

THE COURT: Page?

MR. REPETTO: 84; questions 1, 2, and 3.

"Q. Was there any analysis done as to the effective area to which you could ship from the Narragansett plant?

"A. Prior to the acquisition?

[77] "Q. Yes.

"A. Yes, we certainly examined that as to just what market we could service on Falstaff where we were already selling, you know, less expensively than out of an existing plant. I guess that answers your question.

"Q. Was it determined that you would serve any area other than the New England from the Narragansett plant?

"A. We determined that we could serve certain markets in the Atlantic Coast such as Virginia, possibly North Carolina, Baltimore, Washington, D.C. less expensively out of Narragansett than out of Fort Wayne. Beyond that, it got to be a break even."

MR. CODY: Your Honor, I think the evidence adduced has shown that Falstaff has pioneered new production processes; it has expanded the capacities of various breweries which it acquired; and it has modernized them. Not only that, but the Government proposes to show at this point that Falstaff had been advised by experts that building a brewery was indeed not conjectural but very possible.

THE COURT: Building a brewery?

MR. CODY: Yes, your Honor.

THE COURT: A brewery by it, you mean?

[78] MR. CODY: Yes, your Honor.

THE COURT: An additional brewery by it.

MR. CODY: In this connection we would like to offer in evidence a report by Arthur D. Little, Inc.

THE COURT: Now you said that the building of an additional brewery was what again?

MR. CODY: Not merely conjectural but possible.

THE COURT: But possible?

MR. CODY: Yes, your Honor; according to Arthur D. Little, Inc., which is a management consultant firm, which returned a report to Falstaff on or about April 12th—at least it is dated April 12th—1960, running over 100 pages. We would seek to offer this as Government's Exhibit 10.

MR. GORING: No objection.

THE COURT: It may be marked Government's Exhibit 10; report of Arthur D. Little Company.

Am I to understand that the gist of that report is that the building of an additional brewery by Falstaff was not merely conjectural but rather a possibility? Is that what you said?

MR. CODY: Yes, your Honor. If I may read from it.

MR. GORING: I might say that I do not agree with that fragmentary description of a 118-page report.

THE COURT: It is not too enlightening at best. [79] Didn't we have some discussion about that report in chambers?

MR. GORING: We did, your Honor.

THE COURT: And you gentlemen were going to advise me what part of it was pertinent for my consideration.

MR. GORING: It seems to me at the session we had, at the pre-trial conference, there was merely some general description of what this report was about. And I think it was exhibited to your Honor merely to show what kind of prob-

lems the Government said they had. My recollection was that the Government had in mind—although I do not hold them to this if I am wrong—that probably small portions of the report were of critical significance to them, but it was their view that the entire report should go in and all the background material that is in it.

I simply take the position whether it is relevant or irrelevant, verbose or cryptic, useful or not, I do not object.

THE COURT: I take it I am in error in assuming there was some accord reached by you gentlemen as to what portions of it I should consider. But if I am wrong, I am wrong on that score. It may be marked in any event as Government's Exhibit 10.

(Copy of report of Arthur D. Little, Inc. to Falstaff Brewing Corporation, dated April 12, 1960, marked Government's Exhibit No. 10)

[80] MR. CODY: Very good. In one area of the report, on page 107, it is stated:

"It is evident that, * * *"

MR. GORING: What page, Mr. Cody?

MR. CODY: 107.

MR. GORING: Thank you.

MR. CODY: (Continuing)

"* * * of the brewing facilities recommended for the future, none are proposed to be of 'conventional' design. The reason for this is twofold—to decrease capital costs and increase operating savings in order to increase net earnings per se and to increase the ratio of net earnings to net worth."

THE COURT: It is now 12:30. We will stop here and resume at 2:00 o'clock.

MR. CODY: May I read one more paragraph?

THE COURT: I think it would be better to read it at 2:00 o'clock.

(NOON RECESS)

[81] *AFTERNOON SESSION*

*2:00 P.M.*

MR. REPETTO: Your Honor, the last page which is an appendix to supplemental interrogatories, has become detached from the introduction that we made; and I would

like to make this part of that exhibit which we had introduced previously.

THE COURT: Now you are referring to Exhibit No.—

MR. REPETTO: Exhibit 6, your Honor.

THE COURT: Suppose you show it to Mr. Goring. If he has no objection, it may be added thereto.

MR. REPETTO: I would like to read from that last page, your Honor, of the supplemental interrogatories.

THE COURT: Last page of Exhibit 6—go ahead—supplemental interrogatories.

MR. REPETTO: It is headed "CERTIFICATE."

> "I, the undersigned Harry J. Pettey, do hereby certify that I am Secretary of the Falstaff Brewing Corporation; and that the minutes of the Board of Directors of the Falstaff Brewing Corporation make reference to the Arthur D. Little report dated April 15, 1960 as follows: * * *"

That is Exhibit 10, your Honor.

*"Minutes of Meeting Held February 23, 1959*

[82] 'After a brief explanation by Mr. Joseph Griesedieck on the reasons for hiring Arthur D. Little, Inc., on motion duly made, seconded and unanimously carried, it was

'*RESOLVED*, that the firm of consultants of Arthur D. Little, Inc. be retained for research and consultation, by the Management of this Company, in the areas of long range planning and growth.'

*"Minutes of Meeting Held December 21, 1959*

'Mr. Griesedieck also informed the Directors that the report of the Arthur D. Little company was expected shortly and mentioned a few of the recommendations that have been indicated will be contained in this report.'

*"Minutes of Meeting Held June 27, 1960*

'Mr. Griesedieck also invited comment of the Directors with respect to certain goals that had been set for the future as the result of the Arthur D. Little report.'

"IN WITNESS WHEREOF I have hereunto set my hand and the seal of said Corporation this 24th day of May, 1967."

Signed "Harry J. Pettey."

[83] I would now like to read, your Honor, from Exhibit 10, which is the Arthur D. Little study. I read from a page which is unnumbered but should be page 1 of the study.

THE COURT: Page 1?

MR. REPETTO: Yes, your Honor.

THE COURT: You mean of the report?

MR. REPETTO: Right.

THE COURT: Page 1 of the report.

MR. REPETTO: I am reading the first paragraph of that page.

"Herewith we send you a report summarizing the results of combined teamwork by Falstaff Brewing Corporation and Arthur D. Little, Inc., in developing a program of Forward Planning for Falstaff as authorized by acceptance of the ADL proposal of December 17, 1958. In essence, the team has viewed its assignment as a request that it study what actions Falstaff should take to maximize its profit in the years to come. The conclusions reached as a result of the team's study and deliberations may be very briefly summarized as follows: To improve its position and give itself maximum assurance of success in the future, Falstaff should review and improve its operations in every aspect of its business."

[84] There follow from that paragraph, your Honor, nine separately numbered paragraphs outlining the areas that should be looked into. I wish now to read from page 2, paragraph 3.

"*Transportation.* Under present methods of operation, it is frequently necessary for beer to be shipped substantial distances. This is especially true when cross shipment is required to meet local demands in excess of local capacity. Furthermore, the area which could be served economically by efficient brewing plants might be substantially expanded —even to overseas territories—if significant reduction could be achieved in transportation costs. Bulk movement and the shipment of beer in concentrated form would appear to be fields well worthy of attention because of the substantial savings which could be achieved by successful developments in these areas."

Paragraph 4 headed

"*Marketing.* In the interest of improving Falstaff profitability, the study team has investigated the areas of high-volume beer consumption in the country to determine

which of these it should be possible for Falstaff to reach successfully with efficient advertising [85] and selling effort. It is recommended that in the future Falstaff sell in major areas of population concentration, where its advertising and sales effort would be efficiently employed. Moreover, it should seek to serve these areas by selling through branches, where feasible, rather than distributors. Where distributors are employed, they should be selected as to sales potential with a view to maximizing profitability. Sales effort and support should be avoided in areas where sales potential is unlikely to produce significant profitability. Many of these principles can also be helpfully applied in areas presently served by Falstaff."

On page 3, paragraph 8—it is numbered 8.

*"Growth and Market Entries."*

THE COURT: What is that again, please?

MR. REPETTO:

*"Growth and Market Entries.* An average rate of growth of 10% a year is proposed, and a series of advances into markets and construction of supporting productive facilities is recommended that is believed to be in Falstaff's interest. As might be expected, during the introductory period, while facilities expansions have been made to [86] serve markets not yet fully developed, it may not be possible to achieve the financial margins recommended, but it is confidently expected that improved profitability will result from the programs suggested."

I read from page 5 under the heading *"Falstaff Must Grow."*

"This report counsels Falstaff to plan for and to seek growth. Yet growth is not taken as a desirable objective in itself. Why, therefore, should Falstaff grow? It is believed that growth offers Falstaff several advantages which make expanded size desirable. To achieve these benefits will require expanded operation. Among the reasons for seeking growth are the following:

"1. Falstaff makes its most attractive return from markets which it penetrates to a substantial degree. Other things being equal, Falstaff should therefore seek greater penetration in the areas that it now serves and where its percentage of the market is less than 10 percent. To do so will require growth.

"2. Falstaff does not now sell in the largest beer market of the country, the northeast quarter of the United States, which consumes three-quarters of the beer sold in the country. (See Figure 1) [87] To secure the larger profit ratios of branch sales and distributorships in major centers of population, Falstaff should sell to the enlarging and concentrated markets provided by the large metropolitan areas and the developing 'inter-urbias' of the country. These are now largely outside Falstaff territory. To reach them Falstaff must grow.

"3. To provide the larger volume needed to serve its existing markets more intensively, as well as to satisfy the proposed new markets, Falstaff will have to grow in productive capacity.

"4. Falstaff should, where possible, serve its concentrated markets directly through branches in the effort to obtain the higher returns now experienced by Falstaff in New Orleans, San Jose and St. Louis. This will require growth in both productive and sales organization.

"5. Increased penetration in both its existing and new markets will be expensive, but it will provide a wider base for absorbing costs. This, in turn, will lower cost ratios per unit of product and hence increase profitability."

There are three other paragraphs which I will not read.

I now turn to page 9 under a heading, "Corporate Objectives."

[88] "2. Falstaff seeks national—and perhaps international—distribution in order to achieve such geographic spread and volume of operation as will permit the exploitation of favorable profit opportunities wherever they exist and will provide maximum security against seasonal and local limitations."

Page 10 under a heading called "The Falstaff Market."

"To continue Falstaff's striking success during the past ten years, and to secure the remaining untapped large market Falstaff will concentrate its attention and effort for the next three to five years in the field of brewing and sale of beer. Moreover, for some years expansion of Falstaff will be achieved primarily (although perhaps not exclusively) by the promotion of its own brand or brands rather than by acquisition through purchase of other brands. This plan of action is based on the uncertainty regarding antitrust

action should Falstaff endeavor to acquire significant going concerns as part of the effort to expand. Clearly, however, whenever Falstaff objectives can be advanced by acquisition, merger, or cooperation with other breweries, Falstaff should investigate these possibilities with the [89] intention of acting in its own interest."

Skipping a few paragraphs, beginning at the top of page 11:

"The U.S. population is increasing and, through increase in numbers in the beer drinking ages, will in time afford a larger market. This is so despite the down-trend in per capita beer drinking, which is so slight that with population growth the industry can look forward to increased sales. However, as stated before, Falstaff's sales increases since 1945 have shown that the company can capture increased shares of the existing market even in a period of no market growth. Falstaff's own prediction suggests that its sales will nearly double in its present markets by 1975. However, as stated before, Falstaff does not now serve the greater part of the major beer markets of the central and northeastern U.S. Seventy-three percent of the beer consumed in the U.S. is drunk in these regions. Moreover, eighty percent of consumption in these areas takes place in metropolitan centers of population. Falstaff's success in securing volume sales in the face of competition indicates that Falstaff should be able to win acceptance in these areas. Since costs of sales and delivery are lowest when incurred [90] in connection with serving concentrated markets, these areas should afford Falstaff areas for profitable expansion. Therefore, to achieve growth with profit, Falstaff should seek to establish new markets in major metropolitan areas like Detroit, Chicago, Cleveland, Philadelphia and New York. Furthermore, as discussed in Part III under 'Comparison of Branch and Distributor Sales,' to the extent feasible, Falstaff should operate in these areas through direct selling and delivering branches, with the attendant higher margin of profit.

"The size of the market in the northeastern area of the United States can be seen in Figure 1. It will be noted that four types of data are included in a box for each state, with the information always in the order shown in the legend on the map. Of particular pertinence is the second

(blue) figure, which shows the 1959 consumption in each state in millions of barrels. If these data are analyzed, it is seen that three-fourths of all beer purchased in the United States is consumed in the northeastern area. This is relevant to Falstaff's planning for growth in the future, particularly because of the advantages in reaching concentrated markets with efficiency."

[91] Page 14 under a heading "Order of Sales Expansion."

"From what has been said with respect to future markets, it is evident that Falstaff's sales effort should be planned to achieve deeper penetration of existing markets and also to reach into the new areas of concentration of population. In general, greater penetration of existing markets is needed where penetration is less than 10 percent, to improve the profitability of sales in those areas. Additionally, Falstaff must reach the centers of population that it does not now serve. Not to do so would be to omit too large a portion of the total market. Moreover, the concentrated market groupings proposed should permit efficient selling and distribution, with resulting higher profitability.

"Experience has shown that Falstaff secures easier entry into a market if the new territory is contiguous to areas where Falstaff is already sold. Presumably this comes about from spill-over of advertising effect and by word of mouth reputation. Likewise, advertising and sales effort devoted to contiguous new territory can be expected to have beneficial effects in the existing adjacent Falstaff markets. In order to have these benefits both in new areas and in existing territory, it is suggested [92] that Falstaff in the next six years should extend its sales coverage basically in the following order:

"1. Intensify marketing effort in its present areas where penetration is below a level of satisfactory profitability (10%).

"2. Investigate and correct the California loss operation, starting immediately.

"3. Enter Detroit in the spring of 1961.

"4. Enter Chicago in the spring of 1962.

"5. Enter the East Coast and Southeast Florida areas in the spring of 1965.

"In entering new areas, Falstaff will have the opportunity to decide whether to do so through branch opera-

tions or through distributorships. Falstaff's experience has indicated that its sales are most profitable where they are made through Falstaff branches. The profitability of branches in larger centers of population is especially noticeable Whether this is due to more efficient selling or advertising effort, the price differential to Falstaff from branch sales, or the reduction in transportation costs with shorter delivery distances must be investigated further. It suggests, however, that Falstaff should arrange to sell to the new concentrations of population through branch [93] operations supported by production or packaging plants convenient to them. As will be noted below, it is proposed that in some instances, if justified as the result of more detailed analysis, service to a major market area can be begun by means of a local packaging plant prior to or independent of the establishment of a productive plant in that area."

Page 16 under a heading, "Table of Plants and Schedule."

"1. Expand Galveston production by adding brewing facilities to produce at an annual rate of 1 million barrels. This addition to Falstaff capacity should come into production in early 1961.

"2. Build a new plant in Southern California and another in Michigan at or near Detroit, both to come into production in early 1963. These plants are to be sized for 500,000 barrel annual output on one-shift operation. However, if current figures show more capacity is needed by the time construction starts, make the necessary capital additions to operate the same plants on additional shifts.

"On the basis of engineering analysis and actual experimental data, determine if Detroit should be tripled in size and Fort Wayne vacated instead of modernized.

"3. Start construction of an East Coast plant— [94] probably near Baltimore—sized like those in southern California and Detroit, to come into production early in 1965.

"Note that, except under special circumstances, all of the facilities proposed are new rather than rehabilitated old breweries. The reasons for this suggestion are discussed in Part III in the section referred to above."

I will now read from pages 107 and 108 under the heading "Building vs Buying Facilities."

"It is evident that, of the brewing facilities recommended for the future, none are proposed to be of 'conven-

tional' design. The reason for this is twofold—to decrease capital costs and increase operating savings in order to increase net earnings per se and to increase the ratio of net earnings to net worth.

"Taking past Galveston history as an example, it is clear that by the time original purchase price, cost of bottle shop replacement and cost of originally contemplated conventional brewing addition were combined, a total of approximately 14 million dollars would result. All of this equipment would have to be fitted into existing space thought suitable years ago when Southern Select acquired its property. [95] The net production capacity would have been about 1.2 million barrels annually.

"In contrast, a complete brewery with facilities of the newly proposed design and an annual 1-shift brewing output of 1 million barrels is estimated to cost 16 million dollars. It would incorporate labor-saving possibilities estimated to be worth about $400,000 annually. It would be built on new ground, allowing space for a good, industrially engineered layout. A plant of lesser brewing capacity —for example, 500,000 barrels per year on a 1-shift basis —would cost $10,500,000. The same plant to work three shifts and produce 1½ million barrels could be built for approximately 18.5 million dollars.

"There appears to be ample reason, based on these estimates, for building rather than buying. Thus, we conclude that major new market entrances need not be predicated on the availability of a brewery Falstaff could purchase. This, in turn, allows better control of marketing strategy and timing, and eliminates worries of adverse Governmental anti-trust action. While operating cost savings have been mentioned, it also seems likely that the fastest way to achieve markedly reduced labor usage [96] is to build new breweries of new design, particularly where manning requirements have not been established by precedent.

"In spite of all the seemingly apparent advantages of building vs buying and renovating, this report cannot categorically recommend 'always build, never buy.' Under certain circumstances, buying existing facilities may still prove to be beneficial; but such situations will likely be the exception in the future rather than the rule they have been in the past, since in any event the plants should be sufficiently modified to achieve low-cost production."

As evidence that the Little report that I just read had been followed by Falstaff in at least opening Chicago and Detroit, I would like to read from Alvin Griesedieck's deposition, taken the 2nd day of May 1967 in St. Louis.

THE COURT: Would you be good enough to give me the name of that witness again?

MR. REPETTO: Alvin—A-l-v-i-n—Griesedieck.

THE COURT: This is another gentleman with the same surname. Is that it?

MR. REPETTO: Yes, your Honor. For introductory material I would like to read from page 2, questions 1, 2, 3, and 4; and page 4, questions 1, 2, 3, and 4.

"Q. Sir, would you state your full name, please?

[97] "A. Alvin Griesedieck, Jr.

"Q. And your home address?

"A. 19 Squires Lane.

"Q. Is that in St. Louis?

"A. St. Louis 31, Missouri.

"Q. Are you currently employed by Falstaff?

"A. Yes, sir."

In addition, I will read page 3, 1 through 8.

THE COURT: Page what?

MR. REPETTO. Page 3, 1 through 8. I haven't gotten yet to page 4, your Honor.

"Q. What is your present position with Falstaff?

"A. Director of marketing, vice president, director of marketing.

"Q. For how long a period of time have you held that position?

"A. About eight years.

"Q. Would that be approximately 1960 that you first became director of marketing?

"A. I believe it was '61, seven years.

"Q. Did you replace Mr. Vollmer as the director of marketing?

"A. Yes, sir.

"Q. At the time you became director of marketing was that the time that Mr. Vollmer moved over [98] into his capacity as vice president of planning?

"A. Yes.

"Q. Prior to being vice president, director of marketing what was your position with Falstaff?

"A. Advertising manager.

"Q. In your capacity as marketing director, which would be subsequent to 1960-1961, did Mr. Dependahl report to you, Mr. Charles Dependahl?"

That is spelled, your Honor. D-e-p-e-n-d-a-h-l.

"A. I'm not sure I understand. You say prior to my—

"Q. No, after you became director of marketing, did Mr. Dependahl report to you?

"A. Well, in the first few years he was not the—he didn't report directly to me because he was not the general sales manager. We have had a number of title changes. Mr. Bruce Wightman was the general sales manager at that time, and he reported to me and Mr. Dependahl reported to him.

"Q. Did there come a time when Mr. Dependahl reported directly to you?

"A. Yes. That took place probably in, oh, I would guess it was about '63 that Mr. Wightman retired and he has reported to me [ 99] since that time."

Now I would like to read from page 37, questions 2 through 5; page 38, 1 through 6; page 39, 4 and 5; and page 41.

"Q. Sir, I show you Plaintiff's Exhibit 53 and ask whether or not you have seen that previously?

"A. Yes, I have.

"Q. Are you familiar with that report, sir?

"A. Not—in the past I was quite familiar with it. I would have to say, you know, I have not looked at it recently.

"Q. Do you recall when the last time was that you saw this report?

"A. My recollection would be several years ago.

"Q. Was this report discussed by you with any other management people in Falstaff?

"A. Yes.

"Q. With whom would you have discussed this; with whom did you discuss this?

"A. Mr. Vollmer, Mr. Griesedieck.

"Q. Mr. Griesedieck, you mean Joseph Griesedieck?

"A. Joseph Griesedieck.

"Q. Were you the director of marketing at the time this study was submitted by Arthur D. Little?

"A. I believe I was just, had become the director of Marketing at the time this was completed.

[100] "Q. Was the information compiled in this study used by you in connection with entry into the markets of Detroit and Chicago?

"A. It had an influence on the decision.

"Q. You say influence, you mean that—what do you mean by it had an influence?

"A. Well, I believe one of the points brought out in this study is the need for Falstaff to expand into the metropolitan markets, you know, of the country. This, of course, prompted us to feel that we had to, you know, start moving in that direction.

"Q. Sir, do you recall the year when Falstaff entered the Detroit market?

"A. I'll take a guess at about the year 1960.

"Q. Was that at a time when you were director of marketing that they entered Detroit?

"A. I'm not positive on that, whether I'd be—

"Q. I show you Plaintiff's Exhibit 53 and again direct your attention to page 14, particularly under the caption of 'Order of Sales Expansion' subparagraph 3, No. 3, and relating to the entry into the Detroit market. You see that statement, sir?"

THE COURT: In other words, am I to understand the [101] Little report has been marked somewhere along the line as Exhibit 53?

MR. REPETTO: Yes, your Honor; as Exhibit 10 in this case. It is Exhibit 53 for purposes of deposition.

MR. GORING: It is now in the record as Exhibit 10.

THE COURT: I understand that. But when he referred to Exhibit 53 it wasn't clear to me he meant also Exhibit 10. But that is what you are referring to.

MR. REPETTO:

"Q. I show you Plaintiff's Exhibit 53 and again direct your attention to page 14, particularly under the caption of 'Order of Sales Expansion' subparagraph 3, No. 3, and relating to the entry into the Detroit market. You see that statement, sir?

"A. Yes.

"Q. Was that instrumental in your decision to enter the Detroit market in 1961?

"MR. FARR: I object to the question on the ground it's already been asked and answered.

"A. I believe I have already stated that certainly, you know, this had an influence on our decision to enter Detroit.

"Q. Was there a decision within the marketing division of Falstaff in which you were involved [102] to follow the plan as put forward by Arthur D. Little in that study which you have now before you?

"A. Would you let me have that again, please?

"(Whereupon, the previous question was read by the reporter)

"THE WITNESS: We were guided by the study but I don't believe that we ever considered it a Bible that we, you know, had to follow as a time-table."

I would now like to read from Exhibit 3(c) which is the 1961 annual report of Falstaff.

THE COURT: That would be 1961, would it?

MR. REPETTO: Yes, your Honor. Page 4, under a heading "Sales hit an all-time high."

"The sales department, through its branch and distributor organizations, brought to the public an all-time record quantity of 5,128,048 barrels of Falstaff in 1961. This volume, which amounts to more than 70 million cases of twenty-four 12 oz. bottles or cans, was achieved not only through additional sales in many of Falstaff's established markets, but also through the opening of entire new territories where Falstaff became avaliable for the first time. Key market expansions included [103] the metropolitan areas of Detroit and Toledo and additional high volume markets on the East Coast of Florida as far south as Cape Canaveral.***"

The paragraph goes on, your Honor.

I would like now to offer into evidence a press release from the Falstaff Brewing Corporation, Public Relations Department, October 10, 1963.

MR. GORING: Would you give me the number of the document?

(A pause)

MR. REPETTO: No. 16.

THE COURT: Government's Exhibit 11.

(Copy of press release from Falstaff Brewing Corporation, October 10, 1963, marked Government's Exhibit No. 11)

THE COURT: Press release dated October 10, 1963?

THE CLERK: Yes, your Honor.

MR. REPETTO: I start out with the first paragraph, your Honor.

"Falstaff Brewing Corporation has opened additional markets in the Chicago area, it was announced today by Charles W. Dependahl, general sales manager.

"Dependahl said that Monte Merkel, formerly division sales manager for southern California, [104] has moved to Chicago on special assignment to work with five newly appointed distributors. Merkel is no stranger to the Windy City, as he formerly played offensive guard with the Chicago Bears during the 1942–43 seasons.

"Commenting on the move, Dependahl said, 'This is another step toward our ultimate goal to make Falstaff available to beer consumers all over America. Expansion into Chicago is another planned move in that direction.

"'In Chicago, Falstaff will be priced competitively with other nationally advertised brands,' he added, 'and with this move, our distribution now blankets the state of Illinois.' In addition to the city of Chicago, the new distributors will serve beer retailers in Cook, DuPage and Lake Counties."

There is another paragraph which I will not read.

Would you excuse us one minute, your Honor?

THE COURT: Certainly.

(A pause)

MR. REPETTO: Your Honor, in referring to a further alternative, shipping into New England,—

THE COURT: Referring what, please?

MR. REPETTO:—To another alternative, to shipping [105] into New England, reference to an opportunity to buy an existing brewery in New England, a small brewery that was not the leading brewer in this particular market,—

THE COURT: What about it?

MR. REPETTO: I would like to read interrogatory 1. This is Exhibit 2, question 1. The question is

"Name each brewing company acquired by Falstaff since 1933,***"

THE COURT: Name what, please?

MR. REPETTO:

"Name each brewing company acquired by Falstaff since 1933, excluding the Narragansett Brewing Company, and as to each state:

"the date of the acquisition, the consideration paid and the geographical location of the acquired facilities."

THE COURT: And the date again was what, the acquisition date?

MR. REPETTO: "Acquired by Falstaff since 1933," listing

"the date of the acquisition, the consideration paid and the geographical location of the acquired facilities.

"the capacity, in barrels, of the acquired facilities at the time of the acquisition.

[106] "the geographical area in which the beer of the acquired brewery was sold at the time of the acquisition.

"whether the acquired facilities were remodeled by Falstaff so as to increase its capacity and, if so, the date or dates thereof, the amount in barrels of the increased capacity and the cost thereof.

"the geographical area which was served from such acquired facilities, whether so remodeled or not, as of January, 1965.

"the amount of beer produced at such acquired facilities, whether so remodeled or not, during the year 1964, and the capacity of such facilities."

I am wondering now, your Honor, as I look at it, it is about six pages of reading for the point that they acquired throughout their history small breweries and expanded them. Do you wish that I read through the six pages to make that point or is the reference to the point enough?

THE COURT: I don't think it would be an unjust imposition on the Court's time if you were to read it. Certainly it is not a situation where you are reading a lengthy deposition. If you are relying on anything in it, [107] I think you ought to read it. It should be a part of the record here. We don't want the record incomplete.

MR. REPETTO: I will read it in that case. Answer: "1. (a) through (f)—The information called for by the first inter-

rogatory regarding acquisitions of Falstaff Brewing Corporation was given in detail to the United States Department of Justice in connection with most of such acquisitions and is the possession of the plaintiff."

Mr. Goring: Excuse me just a minute. This, I take it, should be read for your Honor's benefit but we can supply the court reporter with the full text of this tomorrow. It would save time and suit your Honor's thinking.

The Court: I don't think it is going to take so long. I would like to hear it. Go ahead. Let's see what it is all about.

Mr. Repetto:

"The present Falstaff Brewing Corporation, as a business entity, was formed immediately prior to the advent of national prohibition in 1920. During the ensuing 12 years, business activities consisted of the production of soft drinks and hams and bacons at a plant on Forest Park Boulevard, formerly used as a [108] brewery. It was not until 1933, when prohibition was repealed, that Falstaff entered the brewing business with its product, Falstaff beer. Its plant had a capacity of about 100,000 barrels per year. In 1934 an idle brewery in St. Louis, formerly operated by Otto Stifel Union Brewing Company, was leased and used to produce Falstaff beer. This brewery had an annual capacity of about 250,000 barrels. It was purchased for $600,000 in 1944. The capacity of this plant was not substantially increased from the time it was leased until its operation was discontinued in 1952. The principal market for these two breweries was comprised of Missouri, southern Illinois and Arkansas though some sales were made in the territory beyond this natural market area.

"In 1935 Falstaff acquired the Krug Brewery in Omaha, Nebraska, pursuant to a plan of reorganization approved by the United States District Court in proceedings under then Section 77B of the Bankruptcy Act. The cost was approximately $430,000. This facility was used to produce Falstaff beer, which was sold principally in the surrounding market area, consisting of Nebraska, [109] Colorado, Kansas and Iowa. At the time of the acquisition, the Omaha brewing facility had an annual capacity of about 150,000 barrels. In 1941, capacity of this plant was increased by approximately 350,000 barrels through the expenditure of about $1,000,000 in remodeling. In 1947, through an addi-

tional expenditure of $275,000, it was increased by an additional 50,000 barrels. In 1953, through an expenditure of $1,000,000, it was increased by another 150,000 barrels. The geographical area served by this brewery has not changed substantially since its acquisition, except for inclusion of Oklahoma. This facility produced 689,649 barrels of Falstaff beer in 1964. Its capacity is approximately 700,000 barrels.

"In 1937, Falstaff acquired the brewery of National Brewing Company, New Orleans, Louisiana, at a cost of $366,800. It had an annual capacity of about 140,000 barrels. Over the years remodeling has been undertaken to increase capacity. The years in which such remodeling was undertaken, the approximate cost thereof, and the approximate increase in capacity are shown below: [110]

| Date | Increase in Annual Capacity | Cost of Remodeling |
|---|---|---|
| 1937 | 10,000 barrels | $ 200,000.00 |
| 1946 | 198,000 barrels | $ 750,000.00 |
| 1947 | 402,000 barrels | $2,225,000.00 |
| 1953 | 350,000 barrels | $3,800,000.00 |

During the period immediately following acquisition this brewing facility was used to supply Falstaff beer in Louisiana, eastern Texas, and Mississippi. This market has been expanded to include Arkansas, Alabama, Florida, Kentucky, and part of Tennessee. In conjunction with the plant at Fort Wayne, Indiana, the New Orleans facility supplies Falstaff beer to markets in Georgia and South Carolina. During 1964, the New Orleans plant produced 1,007,967 barrels of Falstaff beer. Its capacity was 1,100,000 barrels.

"In 1948, Falstaff acquired by merger (involving the issuance of preferred stock having an aggregate per value of $2,752,695) the brewery of Columbia Brewing Company in St. Louis. Its annual capacity was approximately 500,000 barrels. In 1950 this capacity was increased by 75,000 barrels at an approximate cost of $500,000. Further remodeling was undertaken in 1958 to increase capacity by an additional 25,000 barrels [111] at a cost of approximately $100,000. In 1964 this brewery produced 465,915 barrels of Falstaff beer. Its capacity was 600,000. The principal market area for this plant is Missouri, northern Arkansas and Illinois.

"In 1952, Falstaff acquired the brewery of Pacific Brewing & Malting Co., San Jose, California at an approximate cost of $2,673,000. Its capacity was 200,000 barrels per year. Pursuant to remodeling done in 1955 at a cost of approximately $500,000, the annual capacity was increased by 150,000 barrels; in 1956, at a cost of approximately $50,000, the capacity was increased by 50,000 barrels; in 1957, at a cost of $400,000, the capacity was increased 100,000 barrels. Immediately after acquisition, this facility was used to supply Falstaff beer principally to the northern California market. This market has been expanded to include Southern California and part of Nevada. Shipments are also made to Hawaii and the far East. In 1964, this brewery produced 412,890 barrels. Its capacity was 500,000 barrels.

"In 1954, Falstaff leased the brewing facilities of Berghoff Brewing Company at Fort Wayne, [112] Indiana. The lease contained an option to purchase, which was exercised in 1964 at a cost of $735,464. This facility had an original annual capacity of 400,000 barrels. In 1955 and 1956, remodeling was undertaken at a cost of $650,000, which increased capacity 400,000 barrels. In 1961, at a remodeling cost of $450,000, capacity was increased by an additional 200,000 barrels. In 1964, 966,380 barrels of Falstaff beer were produced at this facility. Its capacity was 1,000,000 barrels. The Falstaff market initially served by this facility consisted of Indiana and parts of Illinois, Michigan and Ohio. Subsequently, the brewery served, in part, the southeastern States of Georgia, North and South Carolina, Maryland, Virginia, West Virginia, Florida, and Washington, D.C.

"In 1956, Falstaff acquired the brewing facilities of Galveston-Houston Breweries, Inc. at Galveston, Texas for $1,271,771. The capacity of this brewery was 400,000 barrels. In 1958, remodeling was undertaken at a cost of $3,330,000, which increased the annual capacity 200,000 barrels. In 1961, additional remodeling was undertaken at a cost of $7,000,000, resulting in [113] an increased capacity of 600,000 barrels. The principal market served by this facility is Texas. Initially, following acquisition, it served only that part of the Texas market in the general vicinity of Galveston and Houston. In 1964, 1,190,927 barrels of Falstaff beer were produced. The brewery's capacity is 1,200,000.

"In 1956, Falstaff acquired the brewery of Mitchell Brewing Company at El Paso, Texas for $1,500,000. Its capacity was 120,000 barrels annually. Through remodeling undertaken in 1956 at a cost of $250,000 the capacity was increased by 105,000 barrels. In 1964, this facility produced 198,851 barrels of Falstaff beer. Its capacity was 225,000. The market served by this brewery is principally western Texas, Arizona and New Mexico. This is substantially the same market supplied at the time of acquisition.

"In 1957, Falstaff acquired by merger (resulting in the issuance of $3,160,000 par value of preferred stock) the brewery of Griesedieck Bros. Brewing Company in St. Louis, Mo. Its capacity was 900,000 barrels. In 1962, $900,000 was spent in remodeling this facility, resulting [114] in a capacity increase of 200,000 barrels. Falstaff beer produced in 1964 at this plant amounted to 1,040,149 barrels. The capacity of the brewery is 1,100,000. The Falstaff market served by this facility following acquisition was the same market served by the other St. Louis plants of Falstaff and this has remained substantially unchanged. Shortly following this acquisition, Falstaff's original plant on Forest Park Boulevard in St. Louis was dismantled and the real estate sold.

"The information set forth above is approximate. It is impossible to give precise delineation of those marketing areas into which Falstaff beer produced at each plant is shipped because this is constantly changing to some degree and because more than one of the breweries supply the same states or parts thereof. Further difficulty is encountered in defining markets precisely, because of the necessity, in periods of peak demand, to make cross shipments to even out supply. Generally speaking, however, the geographical boundaries given comprise the principal market for each plant."

Your Honor, I think I will bow out at this point and [115] let Mr. Sagat continue.

THE COURT: The Court has no objection.

MR. SAGAT: Your Honor, pursuing the point further that Falstaff might have entered New England by buying a brewery, I would like to read the interrogatory and the answer to interrogatory No. 10.

THE COURT: Interrogatory No. 10, Exhibit No. what? Is this the original or supplemental?

MR. SAGAT: These are from the original.

MR. REPETTO: Exhibit 2, your Honor.

MR. SAGAT: Interrogatory No. 10 reads:

"List and identify the brewing companies which sought to sell or indicated an interest in selling its facilities to Falstaff since 1950, not including those which actually sold its facilities to Falstaff."

The answer to that interrogatory reads as follows:

"Following are brewing companies which sought to sell or indicated a serious interest in selling their facilities to Falstaff since 1950, not including those brewing companies mentioned above:

Drewrys, Lts. (Piel Bros.)

Stegmaier Brewing Co.

Goebel Brewing Company"

[116] THE COURT: What is that again?

MR. SAGAT:

"Goebel Brewing Company

Glueck Brewing Company."

Would your Honor like me to spell these names for accuracy? Drewrys—D-r-e-w-r-y-s; Stegmaier Brewing Company—S-t-e-g-m-a-i-e-r; Goebel Brewing Company—G-o-e-b-e-l; Glueck Brewing Company—G-l-u-e-c-k.

The answer to this interrogatory continues further:

> "Over the past fifteen years a number of inquiries have been received from or on behalf of small brewers to determine whether Falstaff had an interest in acquiring them or their assets. Falstaff had no interest. It is not believed that these inquiries could, of themselves, be considered to manifest a serious interest in selling their facilities to Falstaff."

I would now like to introduce into evidence as an exhibit the cross-examination testimony of Joseph Griesedieck in *United States* v. *Pabst Brewing Company*.

THE COURT: When was this deposition taken?

MR. SAGAT: This is not a deposition. This is the cross-examination testimony of Joseph Griesedieck in the case of *United States of America* v. *Pabst Brewing Company*.

[117] MR. GORING: I will object to that on the theory that that can properly come in if and when Mr. Griesedieck takes the stand. It is certainly not a piece of evidence gen-

erally regarded as proper evidence in chief in the case, taking a hunk out of some entirely unrelated case.

MR. CODY: Mr. Griesedieck testified—

THE COURT: Mr. who?

MR. CODY: Mr. Griesedieck, the President of the defendant Falstaff, testified in a Section 7 case—

THE COURT: You mean in some other proceeding unconnected with this one?

MR. CODY: Yes, your Honor. He testified at that trial during a Section 7 case and he made certain statements relating to not that particular trial or the issues involved there, but to what Falstaff had done in the past. What, basically, he said was that every acquisition that Falstaff had made in the past was of a failing company. This is sworn testimony by the President of the corporation.

THE COURT: I don't see what relevance it has in this case. As and when he testifies in this case, if he testifies contrary to that—what you have in mind—you may cross-examine him. Is there any testimony to the contrary that has been introduced in this case up to now purporting to come from this individual?

MR. CODY: Not that I know of, your Honor.

[118] THE COURT: Wait until there is if you want to show inconsistencies, if that is the only point.

MR. CODY: Very well. I will bow to the Court's ruling. I can't see what the problem is.

THE COURT: I can't see the admissibility of it because some individual, concerning whom no statement has been made in this case, made some allegedly inconsistent statement—

MR. CODY: We don't allege them to, first of all,—the inconsistency—

THE COURT: I don't see how any testimony in a case against Pabst has anything to do in this proceeding at the present time.

MR. CODY: What we would like to do is introduce this evidence on behalf of our positive case. We don't ask to cross-examine him on this. All we ask to show by the introduction of this evidence is that most of the breweries acquired by Falstaff in the past have been failing companies, and that is basically what Mr. Griesedieck said. If I may hand up his testimony—

THE COURT: What has that got to do with the merits of this case?

MR. CODY: Eventually—

THE COURT: There is no contention made here that Narragansett Brewing Company was failing, so far as I know. [119] What was done in the past doesn't necessarily govern what was done in this instance.

MR. CODY: No, of course not. But eventually I think the Government will say that there were breweries similar to those previously acquired by Falstaff in other portions of the country available and serving this portion of the country; so, therefore, it was not necessary to acquire No. 1.

THE COURT: I will sustain the objection. Let's get along.

MR. SAGAT: I would now like to read from the deposition of Joseph Griesedieck at page 114.

THE COURT: Joseph—

MR. SAGAT:—Griesedieck.

THE COURT: Would you mind spelling it again? I seem to have difficulty—

MR. SAGAT: Certainly. It is G-r-i-e-s-e-d-i-e-c-k.

THE COURT: Taken when, please?

MR. SAGAT: It was taken on April 26, 1967.

THE COURT: April 26, 1967.

MR. SAGAT: I will read from page 114; questions 2, 3, 4, 5, and 6.

"Q. Did Falstaff ever consider acquiring a brewery of the size of Dawson, are you familiar with that?

[120] "A. Yes, Dawson was offered to us. We didn't have the slightest interest.

"Q. You didn't look into it at all?

"A. No, I knew with the size of it, it was much too small.

"Q. The size of Dawson is what?

"A. 150,000, 200,000 barrels, I'm not sure, but it's a very small plant.

"Q. Was there ever any examination made of the Dawson plant?

"A. No.

"Q. Did they contact you?

"A. Yes. The president of the brewery contacted me at one of our trade meetings. I have forgotten when."

At this point I would like to refer the Court to—

THE COURT: Have you read all you intended to read from the deposition of this witness?

MR. SAGAT: Excuse me.

THE COURT: Have you read all you said you were going to read with respect to questions 2, 3, 4, 5, and 6?

MR. SAGAT: Yes, I have in regard to those questions; yes.

THE COURT: Very well. Now what do you want to read?

MR. SAGAT: What I would like to do at this point is [121] refer the Court to the stipulation, which is Exhibit 1, particularly to paragraphs 8, 9, and 10. I would like to read these to the Court especially because the names of small brewers which sell in New England appear in those paragraphs.

THE COURT: Is this the stipulation as to the line of commerce in which Falstaff was engaged?

MR. SAGAT: That is one paragraph of the stipulation, yes.

THE COURT: Very well; same stipulation. Go ahead.

MR. SAGAT: Paragraph 8:

"In 1965, the following brewers, among others, operated breweries with the capacities and at the locations set forth below and sold beer produced at these breweries in areas of New England and in areas of the State of New York."

At this point in paragraph 8 there is a list of brewers and their locations with the normal annual productive capacity in terms of 31-gallon barrels of each of the listed brewers. I will indicate these.

| "Brewer | Location | Normal Annual Productive Capacity (In terms of 31 gallon barrels) |
|---|---|---|
| Hull Brewing Co. | New Haven, Connecticut | 100,000 barrels |
| Dawson's Brewery, Inc. | New Bedford, Massachusetts | 750,000 barrels |
| [122] Standard Rochester Brewing Co., Inc. | Rochester, New York | 500,000 barrels |
| The West End Brewing Co., Inc., | Utica, New York | 800,000 barrels." |

Paragraph 9 reads as follows:

"In 1965, the following brewers, among others, operated breweries with the capacities and at the locations set forth

below and sold beer produced at these breweries in areas of the State of New York.

| Brewer | Location | Normal Annual Productive Capacity (In terms of 31 gallon barrels) |
|---|---|---|
| Hedrick Brewing Co., Inc. | Albany, New York | 150,000 barrels |
| International Breweries, Inc. (Iroquois-Phoenix Div.) | Buffalo, New York" | |

—no listing for normal annual productive capacity. Then

| | | |
|---|---|---|
| "The William Simon Brewery | Buffalo, New York | 250,000 barrels |
| Fred Koch Brewery, Inc. | Dunkirk, New York | 105,000 barrels |
| Utica Brewing Co., Inc. | Utica, New York | 100,000 barrels." |

Paragraph 10 reads as follows:

"In 1965, the following brewers, among others, operated breweries with the capacities and at the locations set forth below and sold beer [123] produced at these breweries in areas of New England.

| "Brewer | Location | Normal Annual Productive Capacity (In terms of 31 gallon barrels) |
|---|---|---|
| Diamond Spring Brewery, Inc. | Lawrence, Massachusetts | 100,000 barrels |
| Hampden-Harvard, Division of Piels, Bros., Inc. | Willimansett, Massachusetts | 400,000 barrels." |

Your Honor, could we please have a minute?

THE COURT: Go ahead. Take it.

(A pause)

MR. SAGAT: Your Honor, pursuing the same point, that Falstaff might have entered New England by buying a

small brewery, I would now like to read from the deposition of—

THE COURT: Are you through reading from paragraph 10 of the stipulation?

MR. SAGAT: Yes, I am.

THE COURT: Now you want to do what?

MR. SAGAT: I would like to read from the deposition of Joseph Griesedieck, first at page—

THE COURT: Joseph who?

MR. SAGAT: Griesedieck.

THE COURT: The same gentleman?

MR. SAGAT: Same gentleman.

[124] THE COURT: Go ahead. That is the deposition of April 26, 1967?

MR. SAGAT: Yes. This is at page 232, questions 3 & 4; page 233, questions 1, 2, 3, 4, and 5; page 234, question 1.

THE COURT: Very well.

MR. SAGAT: First from page 232, questions 3 and 4:

"Q. During the period, I'll preface three or four questions with the same period, during the period 1960 to 1965, January of '65, did Falstaff have any negotiations with the Genesee Beer Company in relation to a merger or acquisition?

"A. We discussed potential possibilities or advantages of a merger with Genesee at some point. I don't remember when the dates were.

"Q. Was any depth or detail gone into with Genesee as to the possibility of an acquisition?

"A. Not to a great degree. We visited their plant. They came and visited us. We had I think one discussion in Mr. McClellan's home, and it was pretty generally felt we just couldn't get together and that was it."

THE COURT: Was the time fixed for this conference at Mr. McClellan's home?

[125] MR. SAGAT: I believe Mr. Griesedieck stated, "I don't remember when the dates were." That is on page 232, question 3. I am now on page 233, question 1 of the same deposition.

"Q. Again was this an instance where they contacted you?

"A. I really can't recall.

"Q. Do you recall what the difficulties were on getting together with Genesee?

"A. Price.

"Q. Was there an examination or inspection of their plant?

"A. Very cursory by myself only.

"Q. Any examination or inspection made as to their distribution system?

"A. Not to any degree, no.

"Q. When you say the difficulty was price, are you saying that they wanted more than you were willing to pay?

"A. That's right."

Page 234, question No. 1.

"Q. Do you recall the capacity of the brewery?

"A. Not exactly, it was a little over a million barrels, I think."

THE COURT: I think, gentlemen, we will take a short [126] recess at this point.

(RECESS)

MR. SAGAT: I would like to read now from the deposition of Alvin Griesedieck at page 23, questions 3, 4, and 5; and then on page 24, questions 2, 3, 4, 5, and 6.

THE COURT: The various depositions that have been referred to will be opened by the Clerk for the use of the Court.

This deposition, once again, was taken when?

MR. SAGAT: This was taken on May 2, 1967.

THE COURT: Very well; go ahead.

MR. SAGAT: Question 3 on page 23.

"Q. I'll rephrase the question. From 1962 were you responsible for the geographic extensions of Falstaff markets?

"A. Yes.

"Q. And you recall seeing this study at approximately this time, 1962?

"A. I don't recall it specifically.

"Q. Do you recall any discussions in which you were involved relating to the Genesee Brewing Company at this time?"

On page 24, the answer: "Yes."

On page 24, question No. 2:

[127] "Q. With whom did you discuss the Genesee Brewing Company?

"A. Joseph Griesedieck.

"Q. And what was the substance of that discussion?

"A. You mentioned at this time, namely 1962, I'm not—

"Q. That's true.

"A. I don't recall, you know, the year or years at which I had any discussions but whatever period of time it was that he, I think, visited the Genesee Brewery, you know, we had a discussion relative to this being a potential acquisition, and these were—this is what was discussed.

"Q. Was any investigation or study made of the Genesee Brewing Company under your supervision?

"A. I don't think we ever really made any marketing studies specifically such as this study here.

"Q. Sir, I show you Plaintiff's Exhibit No. 12 and ask you whether or not you have seen that previously?

"A. No, I don't recall ever seeing this."

THE COURT: Plaintiff's Exhibit 12—what was that?

MR. SAGAT: That is what I was checking for. Suppose I withdraw that statement for the meantime.

I now would like to read from the deposition of [128] Ferd Gutting, which was taken on May 1, 1967. Page 44, questions 1, 2, 3, 4, 5, 6, and 7.

Question No. 1:

"Was anyone else at Falstaff during the period 1963 to 1965 conducting investigations or analyses of plants in the East or New England, by plants I mean brewers?

"A. You mean other than the ones that we have been discussing?

"Q. Other than yourself?

"A. No. Mr. Vollmer, of course, was involved in some of the studies.

"Q. Were you ever requested to visit and examine the Dawson Brewery in Massachusetts?

"A. No.

"Q. Were you ever requested to visit the Diamond Spring Brewery in Massachusetts?

"A. No.

"Q. Were you ever requested to visit the Hull Brewery in New Haven, Connecticut?

"A. No.

"Q. Were you ever requested to visit the Genesee Brewery in Upstate New York?

"A. No.

"Q. Were you ever requested to visit the Utica Brewery [129] in Upstate New York?

"A. No."

Now on page 45, question 1:

"Q. Were you ever requested to visit the Ruppert Brewery in New York City?

"A. No."

At this point the Government will introduce evidence to show that Falstaff needed and desired entry into New England. The Government will first establish that Falstaff desired to achieve for itself nationwide distribution of its beer.

I would like to introduce into evidence a press release dated June 4, 1961—

THE COURT: Press release, June 4, 1961.

MR. SAGAT:—as Exhibit 12.

MR. GORING: Will you give me the number of the document?

THE COURT: Is there any objection, Mr. Goring?

MR. GORING: I just want to locate the documents, and I can't locate them well by those exhibit numbers. But Mr. Repetto can help me.

THE COURT: Government's Exhibit 12.

(Falstaff Brewing Corporation press release, June 4, 1961, marked Government's Exhibit No. 12)

MR. SAGAT: In this press release there is a reference [130] to a statement by Harvey Beffa, who is described as Executive Vice President and General Manager.

THE COURT: Executive Vice President and General Manager.

MR. SAGAT: And I will quote from this press release. In referring to Beffa it says:

"He added: 'Our goal is to make Falstaff beer available to the public throughout America. This current expansion is another planned step in that direction.'"

THE COURT: He was referring to what?

MR. SAGAT: He was referring to the naming of ten new distributors as part of an expansion program in Falstaff's

newly opened markets in southeastern Michigan and northeastern Ohio.

I would now like to introduce as Exhibit 13 the summer 1961 edition of "The Falstaff Shield." And, in particular, in this edition of "The Falstaff Shield" there is a section called "New Frontiers for Falstaff."

THE COURT: What is this "Falstaff Shield"?

MR. SAGAT: I believe, your Honor, it is a company public relations organ.

THE COURT: Some booklet or pamphlet issued periodically?

MR. SAGAT: Yes, I believe it is issued seasonally. If I may read in that section—

[131] THE COURT: It hasn't been marked as an exhibit? You are offering it as Exhibit 13?

MR. SAGAT: Yes, I am.

(Copy of Summer 1961 edition of "The Falstaff Shield" marked Government's Exhibit No. 13)

MR. SAGAT: There is a statement in the section called "New Frontiers for Falstaff" which reads as follows:

"Thus it is that, although our goal is eventual national distribution, each move into new territory will be preceded by long months of careful research and planning."

I would like to introduce as Exhibit 14 the Fall 1961 edition of "The Falstaff Shield."

THE COURT: It may be marked Exhibit 14.

(Copy of Fall 1961 edition of "The Falstaff Shield" marked Government's Exhibit No. 14)

MR. SAGAT: In a section of this edition of "The Falstaff Shield" there is a section entitled "Another Giant Stride." And under that there is a statement which says:

"Falstaff took another giant stride toward national distribution when it opened the ten new markets June 5."

I would like to introduce as Exhibit 15 a press release of the Falstaff Brewing Company dated February 16, 1962.

[132] THE COURT: It may be marked Government's 15.

(Copy of Falstaff Brewing Corporation press release, February 16, 1962, marked Government's Exhibit No. 15)

MR. SAGAT: This press release, which deals with Falstaff having appointed distributors to newly opened markets in

southern Florida, quotes Alvin Griesedieck, Jr., who is described as Vice President and Director of Marketing, as saying

"'It is another step toward our ultimate goal to make Falstaff available to beer consumers all over America. This current expansion is another planned step in that direction. Our distribution now blankets the state of Florida."

I would like to introduce as Exhibit 16 the March-April 1962 edition of "The Falstaff Shield."

THE COURT: Government's Exhibit 15.

(Copy of March-April edition of "The Falstaff Shield" marked Government's Exhibit No. 16)

MR. SAGAT: This edition of "The Falstaff Shield" refers to Falstaff having opened up new markets in the Southeast. There is a statement in it which reads as follows:

"• • • 'We are confident that the investment will prove to be a sound one that will bring [133] us another step closer to our ultimate goal of national distribution.'"

I would like to introduce a press release dated—excuse me a minute, please. I would like to refer to Exhibit 11, which is a press release dated October 16, 1963. In this release there is a statement by Charles W. Dependahl who is described as General Sales Manager. Dependahl said:

"'This is another step toward our ultimate goal to make Falstaff available to beer consumers all over America. Expansion into Chicago is another planned move in that direction.'"

I would now like to introduce as Exhibit 17 the statement of Joseph Griesedieck, called "Brewing's Bright Future," which consists of remarks made by Griesedieck at a panel discussion before the New York Society of Security Analysts.

THE COURT: It may be marked Exhibit 17.

(Copy of document entitled "Brewing's Bright Future" —Remarks by Joseph Griesedieck at panel discussion before New York Society of Security Analysts, October 16, 1964, marked Government's Exhibit No. 17)

THE COURT: The date of that? Would you give us [134] the date?

THE CLERK: It appears to be undated.

Mr. Sagat: May I see that? The panel discussion took place on Friday, October 16, 1964.

In this statement of remarks on page 16 Mr. Griesedieck answers the following question: The question is

"What is Falstaff's reaction to industry trends in beer sales?"

Mr. Griesedieck answers:

"For long range planning we are aiming for national distribution. Naturally this involves coming East."

I would like to refer the Court to Exhibit 6, which is answers to supplemental interrogatories. In response to question 7—

The Court: Interrogatory 7?

Mr. Sagat: Interrogatory 7, (a) and (b). The defendant has written:

> "Attached hereto and made a part hereof are excerpts extracted by Harry J. Pettey, Secretary of defendant, from minutes of annual meetings of stockholders held during the period, and relating to the subjects, specified in this interrogatory."

[135] One of the excerpts from annual meetings of shareholders regards the meeting of April 27, 1964 where Harry J. Pettey has certified that what I will read is a true and exact copy of the excerpt from that annual meeting. It states:

"He, Mr. Griesedieck, mentioned several new markets that had been opened including Chicago, Illinois and Washington, D.C. National distribution is still Falstaff's eventual goal."

I would now like to read from the deposition of Joseph Griesedieck.

The Court: Taken when? That is the one of April 26, 1967?

Mr. Sagat. This is April 26, 1967. Page 13; questions 1, 2, 3, and 4.

"Q. This is a document you did not submit to us.

However, we do have it in our possession. I would like to ask you to examine page 14, the opening part of that paragraph, would you read that just to yourself?"

This document mentioned in the deposition is the remarks before the Security Analysis which the Government has introduced, I believe, as Exhibit 17.

"A. Which paragraph are you referring to?

[136] "Q. You made reference to the fact that it was in the middle of a paragraph and I just wanted you to see that that was the start of the paragraph. Now, I ask you if you would again turn in the Exhibit 3A to page 16."

THE COURT: What is that again? I didn't get that.

MR. SAGAT: At this point they are simply trying to identify the particular—

THE COURT: The answer was in the form of a question, I take it: "Which paragraph are you referring to?" Is that it?

MR. SAGAT: The second question reads:

"You made reference to the fact that it was in the middle of a paragraph and I just wanted you to see that that was the start of the paragraph. Now, I ask you if you would again turn in the Exhibit 3A to page 16."

THE COURT: All right. What have we got there?

MR. SAGAT:

"Mr. Farr: He means this one, Mr. Griesedieck. Turn to page 16 in that.

"Q. I direct your attention now to the lower righthand corner where there is a quote attributed to yourself and ask if you would read that to yourself, please?

[137] "A. I have already read it.

"Q. Do you recall the date of the meeting before the Security Analysts in New York?"

Answer on page 14 of the deposition:

"No, I don't, offhand.

"Q. Does October of 1964 bring to mind—

"A. I really wouldn't remember. I'd have to check on it.

"Q. Directing your attention to page 3, particularly the date noted there as October 16, 1964—

"A. Well, that must have been the date.

"Q. Do you recall that at approximately that time you were in New York at this meeting?

"A. That's right.

"Q. Now, in making the statement, 'For the long-range planning, we are aiming for national distribution. Naturally this involves coming east. This can only be accomplished as our production capacity is expanded.' In October of 1964, did you have at that time any particular plan in mind as to expansion into the East?

"A. October, 1964, no, not particularly. I think our position was that it would depend on what the opportunities were and what the problems of opening markets became."

[138] Now on page 15, question 1:

"Do you recall that at any time Falstaff conducted a study or survey of the New England market, the New England market being the six New England states?

"A. Well, we conducted a study of that market just prior to our acquisition of Narragansett. At that point, a study was conducted. I can't recall whether there was any conducted prior to that, frankly.

"Q. In conjunction with that study of the market, was there any feasibility study made as to the possible building of a brewery in that area, the New England area?

"A. Not specifically New England, no.

"Q. Was there a study conducted as to the feasibility of building a brewery in the Northeast?

"A. No."

Now I go on to page 76 of the same deposition.

THE COURT: 76?

MR. SAGAT: Yes. Question No. 1 on page 76:

"Mr. Griesedieck, I'd like to show you again Exhibit 3A, page 16, and the statement again in the lower righthand corner of the page. Take a look at that again, please. In relation [139] directly to the statement that naturally this involves coming East, what did the word 'East' mean at that time in your statement?

"Mr. Farr: Will you indicate what that time is?

"Q. The time of the speech, October, 1964.

"A. Well, at that time, we had been talking to Narragansett, so I presume I was referring to that.

"Q. Does that then coincide with the following statement: 'For the present, it is likely that our pattern of contiguous growth, that of entrenching ourself in an area, then spreading out to surrounding areas will continue.'

"A. I would presume that was on the basis that since our discussions with Narragansett were very preliminary, it would appear as though that pattern of growth into an area we could service of existing plants was one that we were at least as far as the general marketing department of the company was concerned, a pattern we would follow. And these discussions with Narragansett, of course, were

very limited as to who knew about them. We weren't about to make any public statements at that stage as to the fact we were considering this."

I now go to page 19 of the same deposition; questions 2 and 3.

[140] THE COURT: Page 19?

MR. SAGAT: Yes.

"Q. In the last few years, let's say 1962 to date, have the national brewers' sales been progressing at a larger rate than the large regional brewers?

"A. Generally speaking, yes.

"Q. Has this been a matter of concern to Falstaff?

"A. Definitely."

Page 20; questions 1, 2, 3, and 4.

"Q. Have the national brewers been making inroads into the existing Falstaff markets?

"A. Definitely.

"Q. Have they been hurting the sales of Falstaff in their current regional markets?

"A. Yes.

"Q. What has been the plan of Falstaff to counteract this growing sales volume of the large nationals?

"A. It's been difficult. The large nationals, through their pricing tactics have made it very difficult for us to be competitive without price cutting. We have attempted to establish through our advertising markets and techniques that we are a top class product, we are a wholesale organization which is vital to the success of [141] any brewer, to establish proper relationships with the retailer, and by and large, just attempt to do the best merchandising job we can to convince the public that we are deep in quality with the national brands. However, over the years, the national brands have acquired this aura of prestige, which when combined with their price promotion, make it difficult for a regional brewery to compete.

"Q. Has there been any discussion within the Board of Directors of Falstaff on expansion out of the existing regional area in which they sell to other markets?"

Answer on page 21:

"Now, when—

"Q. 1964?

"A. We have always discussed within our Board of Directors our ambition that—I don't think it's been publicly stated—that we feel in order to be competitive with the so-called national brands that we have to become national because this prestige factor is of vital importance. The ability to advertise on a national basis is important and so that while our timetable has certainly never been pinned down on the specific basis, we have always taken [142] the position that when the right opportunities are made available for opening a particular market, we would attempt to look into it, but this involves many factors in different markets. That's about all I can say on that subject."

I now turn to the same depositon, page 23, question 1.

This is the question:

"In the period 1960 to 1965 was there any discussion by the Board of Directors about the possible acquisition of a brewery in the Northeast as defined previously?

"A. The period 1960 to 1965, yes."

I now turn to page 32, question 3.

"Are there certain factors that are inherent in national distribution that give them an advantage over a large regional or a regional brewer?

Answer on page 33:

"Several, in my opinion."

Page 33, question 1:

"Would you list them for me, please?

"A. One, I think I stated earlier, the opportunity to use a national vehicle for advertising such as a television spectacular, or a vehicle such as the 'Tonight Show.' We are limited to [143] regional marketing and advertising opportunities. Another is the prestige that is gained from having it available all over the country for the great mass of people that travel back and forth today, they can get it anywhere they want, and they begin to think of this as a product that must be better, and then the period of years at which this brand sold at a higher price over the so-called regionals, and they have just established this prestige image. All these are factors, of course, particularly, as I stated earlier, where they were promoting price in many

markets, where they were selling at or under us and that is bound to create a desire on the part of the consumer to upgrade himself to what he calls a bargain situation.

"Q. Are there any others that come to your mind?

"A. There may be others. These are the principal ones that we see.

"Q. Does the weather have any effect on sales?

"A. Well, again, being national, of course, there is some protection there. The weather is definitely a factor. To the degree that a market is limited to a brand, the weather can be more of a factor than if he's spread all over the country. If [144] it happened to be cold in one area and warm in another, it balances itself out. If you're limited in scope and if you happen to have an abnormally cool spring or a heavy snow, like Chicago this winter, those brands are much more penalized than that brand that may also be selling in California at the same time where they are having a heat wave or something, so it's a factor, although probably not as important as some of the others I mentioned."

On page 34, question 1:

> "Does Falstaff have labor contracts with each of its plants or does it have a labor contract universally throughout?

"A. Each plant separately.

"Q. Is this true of the brewing industry, do you know?

"A. Generally speaking.

"Q. Do labor troubles, strikes, things of this nature have an effect on sales?

"A. Definitely.

"Q. Would there be a difference between the national versus the regional?

"A. There is an effect on all brewery sales when there's a strike in an area. Those brands who are shipping in where they are not on strike [145] definitely have an advantage, whether they be national or regional."

Page 35, question 1:

> "Has this ever occurred in Falstaff's own particular marketing arrangements?

"A. Definitely.

"Q. Do those sales losses, due to a strike, are they usually regained?

"A. Well, it takes a long time and sometimes never.

"Q. Is a national more able to compete with a local brewer on a local level pricewise?

"A. I don't quite understand how you mean that.

"Q. By reason of the diversification of the national brewer, is he more able to stand a price competitive situation in a particular market?

"A. Quite frankly, they are the ones that are causing the price competitive fights, yes; I'd say so."

Page 36, question 1:

"What would be the basic ingredients for a brewer to go national in his sales?

"A. Money, first of all; a good product; and a good wholesale organization.

"Q. Would it be necessary for a national brewer—

"A. And talent.

"Q. Excuse me?

[146] "A. And talent of management, if you want to call it that.

"Q. Talent in the management level or in the local regional level where they would be selling?

"A. All the way through the organization, primarily the top management level.

"Q. Would a brewer • • • "

THE COURT: Is this page 36 you are still on?

MR. SAGAT: Yes, I am still at page 36. I am now at question 5.

"Q. Would a brewer need regional plants to go national?

"A. In today's market, I would say so, yes."

THE COURT: "Regional plants." Those are breweries, aren't they?

MR. SAGAT: Brewing plants or production facilities, I suppose.

"Q. Has it ever been discussed in the last five years since 1960, has it been discussed before the Board of Directors who will be the most successful in the brewing industry?

"A. You mean what companies or the manner in which they operate?

"Q. The manner in which they operate?

"A. Certainly, there have been many discussions in [147] our Board as to the belief that those brands who are national who have a complete range of product in the sense of different priced brands and those brands with a strong wholesale organization and a good marketing operation are the ones that will be the most successful. This has been the —certainly a prediction that I made even before 1960 and this is what is happening in the industry today."

The foregoing deposition testimony and documents which the Government has offered into evidence have been introduced to show that there are advantages in being a national brewer and that Falstaff was very much aware of these advantages and desired to have these advantages.

I would now like to read from page 39 of Joseph Griesedieck's deposition. Question No. 1:

> "Has Falstaff ever considered the possibility of introducing a second beer, a second brand of beer?

"A. We have given it a lot of thought many times, primarily in the premium price area and have always come to the conclusion that to do so would be prohibitively expensive and would take many, many years and it was believed that we shouldn't take those resources away from Falstaff. It's [148] our belief that there is a limit to the number of premium priced beers that could be developed from scratch.

"Q. Would this need or this desire for a second beer be discussed in conjunction with the hopes that one day you will go national?

"A. I don't recall whether it was discussed in context with that or not. As I stated here earlier, we always said we wished to go national but I think that the fact that we felt the second brand of beer was important probably became more of an issue from about 1960 on when we saw the definite trend toward the national brand, the so-called premium priced brand, and the need to give these wholesalers two brands."

Page 55, question No. 1:

> "It is true, is it not, that Falstaff has never built a brewery?

"A. Correct.

"Q. To date?

"A. To date.

"Q. And has Falstaff considered building a brewery other than the two that you mentioned, one in California and one in the Southeast?

"A. Those were the two primary locations that I [149] recall. I don't recall any other locations, no."

Then on page 56, question No. 1:

> "Would Mr. Vollmer be the man then who would be conversant with the entering into the Northeastern area of the country?

"A. Mr. Vollmer and I worked together on that, on those moves, yes. He would probably have some knowledge of them. I am sure he was involved at the time."

THE COURT: I think it is 4:30. We will stop here, gentlemen, until 10:00 o'clock tomorrow morning.

MR. CODY: Your Honor, if it please the Court, I have one matter to take up.

THE COURT: We will take it up tomorrow morning. The Court has adjourned.

(Adjourned at 4:30 p.m. until Wednesday, October 7, 1970, at 10:00 a.m.)

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA

*v.*

FALSTAFF BREWING CORPORATION

C.A. No. 3523

Before his Honor, Chief Judge Day
Wednesday, October 7, 1970

APPEARANCES:

For the Government: Philip F. Cody, Esq.
Bruce Repetto, Esq.
Kenneth A. Sagat, Esq.
Department of Justice
Antitrust Division

For the Defendant: Hinckley, Allen, Salisbury & Parsons; Matthew W. Goring, Esq. of counsel.
Jerome M. McLaughlin, Esq.
St. Louis, Missouri

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[153] *SECOND DAY*

*Wednesday, October 7, 1970*
*10:00 a.m.*

MR. REPETTO: Good Morning, your Honor.

I would like to first correct a mistake that was make yesterday. A document that was read into the record had a certificate that makes references to several meetings—minutes of the meetings of the Board of Directors of the Falstaff Corporation, signed 24 May 1967 by the Secretary of the Corporation, Harry J. Pettey, and it was attached to Exhibit 6 incorrectly.

THE COURT: Exhibit 6?

MR. REPETTO: I would now like to remove that and offer this document into evidence as Exhibit 18.

MR. GORING: No objection, your Honor.

THE COURT: Now the title of the document will be what, "Certificate"? Exhibit 18.

[Certificate, signed May 24, 1967, by Harry J. Pettey, Secretary of Falstaff Brewing Corporation, previously marked as attached to Government's Exhibit 6, marked Government's Exhibit No. 18.]

THE COURT: As to certain minutes of meetings. Is that it?

MR. REPETTO: Yes, your Honor. There are three [154] meetings listed. I would like the record to show all reference to this document as Exhibit 6 be read as Exhibit 18.

THE CLERK: The Certificate is dated May 24, 1967.

MR. CODY: For the record, your Honor, perhaps we might ask that all references to that particular part of Exhibit 6 be read as Exhibit 18; Exhibit 6 still being in evidence by itself.

THE COURT: Certainly. The record will so indicate.

MR. CODY: Before we continue with our substantative case, your Honor, there is one problem I would like to resolve.

MR. GORING: I am sorry, Mr. Cody. I cannot hear you.

MR. CODY: I am sorry; I will speak louder.

Yesterday I was informed by Mr. Goring that he intends

to call an additional witness, one Edward Vogel, from Missouri, who, as I understand it, is an employee of Anheuser-Busch Brewing Corporation. The pretrial order under which we are trying this case provides for at least 15 days' notice of additional witnesses. We have once already allowed Mr. Goring to specify a witness outside the time limit set for said specification. I feel this is an extremely late date to notify us of an additional witness and, therefore, the Government objects to the [155] Court's allowing this witness to testify on behalf of the defendant.

MR. GORING: I am prepared to speak on this subject at this time, if your Honor chooses. But the fact is I suggest you have nothing before you until the witness appears. I am quite prepared now or when the time does really arise to explain why this circumstance occurred and ask your Honor to rule upon it then.

THE COURT: What do you say to that, Mr. Cody? At the present time there is a professed intention of Mr. Goring to call this witness at some time.

MR. CODY: I would be interested at this time to know exactly why this witness was not designated before and why he is designated now. That may help us in preparation for his cross-examination and considerably shorten the time needed for it and thereby aid the Court.

MR. GORING: I am quite prepared to inform the Government and the Court on this point. The pretrial order does in fact, as Mr. Cody has said, call for advance information respecting witnesses proposed to be called and, in general at least, the subject matter of the testimony which is to be adduced.

Now, I did not know this witness was available until sometime in the last three days. I did not, when I learned that he might be available, make then a decision that I [156] should like to call him. The subject matter of inquiry which will be made of this witness is within the bounds of the subject matter to be adduced by other witnesses.

THE COURT: In other words, it is cumulative testimony.

MR. GORING: It is accumulative testimony from a different—well, shall I say from a different sort of witness, whose experience will add a little to the stature of what he says. The ground to be covered is not new.

MR. CODY: May I have one minute, your Honor?

THE COURT: Certainly.

[A pause.]

MR. CODY: The only thing I would say, your Honor, is that this does put the Government at somewhat of a disadvantage.

THE COURT: In what way?

MR CODY: In that if this witness is to testify within a few days, that we may not have adequate time to totally research his background. I would ask the Court in a general way now, if we do need additional time to prepare for cross-examination of this witness, whether that time will be available.

THE COURT: In effect, you would be suggesting to me this matter, which we had hoped to try within a given time, may be further continued. Is that what you are saying?

[157] MR. CODY: No, your Honor. All I am saying is that it may be necessary for the Government to ask for a day or two to conduct additional research. I don't know, for instance, whether this man has written articles. We will have to check into his background somewhat, whether he has testified in previous proceedings.

THE COURT: I think what we will do is cross that bridge when we come to it.

MR. CODY: All right. Very good, your Honor.

MR. SAGAT: Your Honor, yesterday the Government in presenting its case was introducing evidence to establish that Falstaff was a likely entrant into the New England market. In particular, before adjournment, the Government was presenting evidence to establish that Falstaff needed and desired entry into New England. I will now continue to offer evidence to establish that point.

THE COURT: Very well.

MR. SAGAT: I will now read excerpts from depositions which, in establishing that point, show in particular the corporate interest of Falstaff in expansion. I will first read from the deposition of Joseph Griesedieck which, as indicated yesterday, was taken on April 26, 1967. I will first read from Page 91, questions 1 and 2.

"Q. I show you this Plaintiff No. 6, Mr. Griesedieck, . . ."

[158] THE COURT: Show what, please?

MR. SAGAT: Plaintiff No. 6. It refers to a deposition exhibit which is—

THE COURT: Attached to the deposition?

MR. SAGAT: It is not attached to the deposition. It is a separate exhibit which we will be happy to show the Court. This exhibit is a series of data on an accounting sheet which the answer to the deposition, which I will read, I think, will explain.

"Q. I show you this Plaintiff No. 6, Mr. Griesedieck, and ask you to examine it. Do you recall having seen that sheet?

"A. I do.

"Q. Where did you first see it?

"A. This is part of our long-range planning program where we would project estimated sales based on some arbitrary figure. In this case, we used the figure ranging between 5 percent and 6 percent, I think, just to see what projecting out beyond a certain point would require in terms of capacity increases as it takes a year or two to develop these increases and we are constantly bringing this forward and as times and sales change, this is re-worked. This was based on '64 actuals, which as I pointed out, was our [159] highest peak and was jumping at 5 percent increments.. We haven't hit—in fact, it's been declining instead so this shows what we would have needed had we sold that kind of business."

I move on to Page 94, questions 1, 2, 3, 4, 5, and 6.

"Q. There was no cost study, as such, done?

"A. No.

"Q. I ask you now to look at Line 15 starting approximately in the second column which shows the figure of $20,000,000.

"A. I guess I was really underestimating when I told you ten. It was twenty.

"Q. Or $21.40 per barrel. Now, Plant 7, I believe, is Fort Wayne?

"A. Right.

"Q. Would the study that you made reference to done by your Detroit engineers be the basis for that figure?

"A. Right. I was referring in my discussion with you of Phase One. I don't recall how Phase Two fitted into this thing. I'd have to again refer to the details. This was to be spread over a period of time.

"Q. In arriving at the figure as to $30.00 per [160] barrel in relation to the Southeast, which other brewers was this discussed with?

"A. I can't remember.

"Q. Would you have discussed this with Carling?

"A. No. Some of this, I'm sure, was gleaned from Anheuser-Busch's statement of what it was costing them. Some of it was gleaned, I think, from what our own rough estimate showed. I think we obviously were just throwing a rough estimate in there just for projection purposes. There was no point in getting into details on this until we made a determination we were really interested in moving ahead with it."

Now I will read from the same deposition, Page 109; questions 3 and 4. No, excuse me. That is Page 100; questions 3 and 4.

"Q. Was it part of the Falstaff marketing situation to try to sell Falstaff at military installations?

"A. We do that, yes.

"Q. Is this an area in which you would get people from all over the country to gain acceptance of your name?

"A. Certainly that's a factor."

I now refer to Page 179 of the same deposition; [161] questions 2 and 3.

"Q. The negotiations with Narragansett terminated in February of '62, is that correct?

"A. That's right.

"Q. Mr. Griesedieck, I show you Exhibit No. 20. Would you examine that, please?"

THE COURT: This is an exhibit again with that deposition?

MR. SAGAT: With that deposition; yes, your Honor.

"—Sir, this is a press release from your corporation allegedly referring to statements made by you. Would this be a type of press release that you would see and approve?

"A. I would think so, yes."

On Page 179, question 3—question 4.

THE COURT: Question 3 or 4?

MR. SAGAT: 3, I just read. Excuse me, your Honor. 4.

"Q. Directing your attention to the second page, first paragraph relating to the expansion of Falstaff in the long-range expansion program, particularly the quotation: —"

THE COURT: Is this "second page" referring to Exhibit 20, so-called?

MR. SAGAT: Yes, it is, your Honor.

[162] "—particularly the quotation: 'The total program would call for an expenditure of thirty million in the next ten years.' What expansion was contemplated at that time, October, 1964, other than the expansion you have already explained to us in St. Louis?

"A. Well, that was part of it. The basic, the major expansion was Fort Wayne, contemplation of Fort Wayne, which was some twenty million dollars. We then estimated in the ten-year period on the basis of an optimistic projection of 5 percent a year, we would have to have capacity in some of our other plants, and we just took a rough estimate of ten million dollars to round out this figure. This was not based on any, let's say, detailed, long range study. This was just an estimate based on what we thought our capacity needs for our existing markets would be in the next ten years, assuming, as I stated earlier, annual sales increase between 5 and 6 percent. That projection that you have there is the one that was used to rough up these figures."

I will now go on to Page 181; questions 1, 2 and 3. Excuse me, your Honor, that exhibit in the deposition, [163] Plaintiff's Exhibit 20, I would now like to introduce into evidence as the Government's Exhibit No. 19. This is a press release, Falstaff Brewing Corporation, dated October 16, 1964.

THE COURT: Exhibit 19.

[Copy of Falstaff Brewing Corporation press release, October 16, 1964, marked Government's Exhibit No. 19.]

MR. SAGAT: On Page 181 of the deposition of Joseph Griesedieck, Question 1—this question, as you will see, your Honor, refers to the Plaintiff's Deposition Exhibit 6, which I mentioned a few moments ago.

"Q. Now, that document . ."

THE COURT: Was that Plaintiff's or Interrogatory 6?

MR. SAGAT: That was Plaintiff's Exhibit 6 for the deposition.

THE COURT: Oh, for the deposition.

MR. SAGAT: [Continuing]

"Q. Now, that document, Exhibit 6, shows a plan of twenty million dollars for the Fort Wayne plant, is that correct?

"A. Correct.

"Q. And an increase in barrels in the Fort Wayne plant of approximately a million barrels?

"A. This doesn't break it down unfortunately by plant, so I would have to—they show a month—[164] this is a monthly figure. This would be approximately a hundred thousand barrels—I would assume that would be a million roughly for a year.

"Q. At the time this plan was drawn up, what was the plan for that additional capacity at Fort Wayne?

"A. Well, it was in two phases. Phase 1 represented, I haven't got the details, as I recall it Phase 1 was more in the area of rehabilitation of the plant with some expansion. Phase 2 represented an additional expansion program. This was to be done either simultaneously or spread out. We had no finalized decision on that. As I stated I think earlier none of this was done except the installation of a warehouse, which was part of this program."

I now refer to the same deposition, Page 106.

THE COURT: You are going back now to Page 106.

MR. SAGAT: Question No. 2 which runs onto Page 107:

"Q. Mr. Griesedieck, I am going to show you Plaintiff's Exhibit 7 and it is, as you heard, the proxy statement and I'd like you to take a look at it—"

THE COURT: Proxy statement?

[165] MR. SAGAT: Yes, your Honor. That in this proceeding is Plaintiff's Exhibit No. 5.

"—and it is, as you heard, the proxy statement and I'd like you to take a look at it and see whether or not you saw that before it was printed?

"A. Well, I'm sure I saw it in the Printer's galley proof."

Now, for questions 1 and 2 on Page 107.

"Q. This is something that would be presented to the Board of Directors to authorize to be issued?

"A. I'd like to ask my counsel that. I don't know.

"Mr. McClellan: It was presented. I don't know whether they read it or not. It was presented.

"Q. I'd like to direct your attention, sir, to Page 2, the

first paragraph of that section entitled, 'Considerations relating to the proposed acquisition,' and ask you if you will read that to yourself, please? I'd like to direct your attention to the sentence in the middle of that paragraph, and I will quote: 'On the other hand, Falstaff faces sharply increased competition in its major markets, [166] particularly in the South and Southwest where breweries are now being constructed by Anheuser-Busch and Schlitz, the nation's largest brewers.' This relates back to the statement you made earlier today that you were facing more and more increased competition in your basic marketing area in 1964?

"A. Well, actually I think this was developed in early '65, but the trend was certainly there, that's right."

On Page 108 now, questions 1, 2 and 3.

"Q. What was the sharply increased competition in your major markets that's referred to here?

"A. I think they are referring to the potential competition developing out of the building of plants by Busch and Schlitz in the Texas market, particularly where we have always been a large factor. It was quite obvious to us with these plants in these areas where the local influence—particularly in Anheuser-Busch's case, their promotions, their gardens and all the rest of the things they have done—was bound to create additional competition in the Texas market as far as the South is concerned. This would enable these brands to obviously become a [167] little more competitive price-wise because of less freight and these have been our major marketing areas and we were being cut into by these brands even prior to their building these plans. It looked to us that with the addition of these plants certainly they were going to be more competitive.

"Q. Were you losing sales in your marketing area to the nationals in late '64?

"A. Late '64, the trend was beginning to be felt. Certainly it was being accelerated in '65.

"Q. Was there a similar loss of sales in your marketing area during '63?"

The answer on Page 109:

"I can't recall. There probably was some although we were probably gaining in others, so I can't recall exactly. I think the great acceleration of the premium or national brands has been more, say, in the last three years. In addi-

tion, of course, Pabst has entered into the picture at that point, too, as a competitor, not so much in Texas but in the South."

THE COURT: This deposition was taken when, in '67?

MR. SAGAT: This was taken in '67, April of '67.

[168] I now read on Page 110 of the same deposition questions 1, 2, 3 and 5.

"Q. Again, quoting in the paragraph on Page 2 in Exhibit 7:—"

—which I will just say is the Government's Exhibit 5 in this case—

"—'It needs further diversification of markets for its products, particularly in the Northeastern States and in the popular centers of New York and Pennsylvania.' Would you explain the need for the further diversification of markets for its products?

"A. Well, it gets back to the philosophy that as an attempt to become national, these were the areas where we had to move, provided the proper conditions were to exist either through facilities, distribution, market conditions, et cetera.

"Q. Is the Northeast a high beer consumer area?

"A. Probably the highest in the United States as an area.

"Q. Is this a desirous area to be selling beer in?

"A. Certainly it is.

"Q. Prior to this time, prior to the acquisition of Narragansett, was there no discussion before the [169] Executive Committee of Falstaff as to the possibility of entering into this market, the Northeast market?

"A. Prior to the acquisition of Narragansett, prior to the consideration of the acquisition of Narragansett?

"Q. Prior to the acquisition—strike that. Prior to the consideration to acquire Narragansett, was there a discussion before the Executive Committee as to the desirability of being in that market?

"A. Sure, we have discussed at times the desirability of being in that area as part of our total national program. No specific proposal was proposed that I know of other than the one we are talking about here if you're speaking with reference to New England. If you're speaking with reference to other areas, there were other areas that I

think you're aware of, but nothing that we developed. I mean, these were all things brought to us. We did not at any time that I recall ever specifically say, the Board or the Executive Committee, we want to be in New England and we're going to go in New England next month or something like that, if that's [170] what you're referring to. We probably said—I know we did—that it was our ultimate ambition to be national, and to that degree, someday we would have to sell the Northeast, but we would not be able to do it without the proper combination of opportunities."

On Page 112, question 4.

"Q. Was there any particular need to be in the Northeastern States?

"A. Only that it represented the large beer consumption area and that ultimately this was a market that we felt we had to be represented in if we were to become a national factor. Without being in that area of the country, nobody could be a national factor because this is where the bulk of the population exists."

I now refer to the deposition of Alvin Griesedieck, taken May 2nd, 1967.

THE COURT: May what?

MR. SAGAT: May 2nd, 1967.

I refer first to Page 7, questions 3 and 4.

Question 3:

"Was it a part of your function as director of marketing, this would be subsequent to 1960, [171] 1961, was it a function of your job that you consider new ways to sell Falstaff beer in markets they were not then selling it in?

"A. Yes, I would say it was.

"Q. And were you concerned merely with those areas that touched on the present Falstaff market, or were you concerned with any area that Falstaff was not selling in?

"A. Generally speaking, I would say that I felt it was my responsibility to, you know, to be abreast of, you know, potentials of, you know, for beer sales anywhere that we weren't selling, but primarily in areas contiguous to our present marketing area."

In the same deposition I will turn now to Page 26, Questions 1 and 5.

THE COURT: 1 and 5. You are going back to 1. Is that it?

MR. SAGAT: This will be Page 26, questions 1 and 5.

THE COURT: Page 26.

MR. SAGAT: [Reading]

"Q. I show you Plaintiff's Exhibit 52 and ask if you would read the first page to yourself, actually just the lower paragraph on the lefthand column unless to wish to read the entire [172] article."

THE COURT: Is this Plaintiff's Exhibit 52 an exhibit marked in connection with the taking of that deposition?

MR. SAGAT: Yes.

THE COURT: Is it in evidence in this case?

MR. SAGAT: No, it is not, your Honor.

Question 5 on Page 26—

THE COURT: Page 26.

MR. SAGAT: [Reading]

"Directing your attention to the right-hand column on that first sheet, the first full paragraph: 'Yet in this area in 1957 Falstaff will sell well in excess of four million barrels . . ."

THE COURT: What area were you referring to there: "in this area"?

MR. SAGAT: I believe that is referring to Falstaff's basic marketing area in 1957.

THE COURT: Its entire marketing area?

MR. SAGAT: In 1957.

THE COURT: 1957?

MR. SAGAT: Yes.

THE COURT: Ten years before?

MR. SAGAT: Yes.

I repeat the question, question 5 on Page 26: [173] "Directing your attention to the right-hand column on that first sheet, the first full paragraph: 'Yet in this area in 1957 Falstaff will sell well in excess of four million barrels, which will be approximately 18 percent of the beer sold in the area.' Do you recall at that time that this was approximately the market penetration of Falstaff in its current marketing area?

"A. I believe it was, yes."

Now, on Page 27, the same deposition, questions 1 and 2.

"Q. Did you have a similar figure of market penetration for the basic marketing area in 1964?

"A. You mean for this same area?

"Q. The Falstaff marketing area as it was in 1964, did you have a market penetration figure?

"A. I wouldn't have it right off the top of my head, no. I know it would be less, substantially less."

Turning to Page 28, question 3:

"I would ask you, sir, what do you mean by substantially less as to the market penetration in 1964?

"A. I would speculate that about that time that [174] penetration probably dropped down to around 13 percent. That, again, is somewhat of a guess."

Now to Page 30; questions 3, 4, 5 and 6. Excuse me. I will read questions 2, 3, 4, 5 and 6.

"Q. Were there any other metropolitan areas that you can recall where you were having trouble from the nationals?

"A. Where we were or were at that time?

"Q. Yes, 1963, 1964.

"A. Metropolitan areas, Kansas City—the reason I'm hesitating is because back at that time we were probably having just as much trouble from strong regional brands in some areas as we were from nationals.

"Q. Then in addition to the nationals as to making inroads to your sales, also large regionals were hurting Falstaff's sales?

"A. Back in those years, yes.

"Q. By those years, do you mean—

"A. In fact, still are.

"Q. Do you mean from '63, '64?

"A. Yes.

"Q. Also was it prominent before '63?

"A. Yes."

[175] Now to Page 31; questions 1, 2, 3, 4 and 5. I will read questions 2, 3, 4 and 5.

"Q. Was there any discussion at which you were present where it was discussed that the northeastern section of the country was the logical area for Falstaff to move into?

"A. Would you repeat that?

[Whereupon, the previous question was read by the reporter.]

"THE WITNESS: Yes.

"Q. With whom did you discuss that subject?

"A. Oh, I would say it was discussed at meetings with

top management. It was called to our attention by our advertising agency that, you know, in discussions as to the future plans.

"Q. By top management, do you mean by name—

"A. Joseph Griesedieck, Harvey Beffa, Mr. Vollmer.

"Q. As you recall it, what were the reasons that made the northeast a logical move?

"A. Just the fact that it's the highest per capita consumption, the largest potential beer-consuming area in the country."

In that same deposition I now turn to Page 58, question 4.

"Q. Sir, I show you Plaintiff's Exhibit 12,—" [176] — that is a deposition exhibit—

"—which I showed to you earlier and I again direct your attention to Page 3, and under the subcaption 'Reasons for the Proposed Merger' and particularly the sentence which relates to the inroads being made on the Falstaff marketing area. Would you read that to yourself, please? I ask you, sir, whether you recall that at that time the national brands were making inroads into the Falstaff market? That document is dated February 18, 1964.

"A. Yes, they were making inroads."

That answer was on Page 59. Now on Page 59 I will read questions 1, 2 and 3.

"Q. Was this a problem which was discussed by you with other management people at Falstaff?

"A. Yes.

"Q. Were you requested to make any suggestions in your capacity as director for marketing as to ways to alleviate such problems if, indeed, it was a problem?

"A. We had many discussions relative to whether our course of action could best be served by, you know, further expansion to compensate for the inroads, as opposed, or in contrast to the [177] philosophy of just investing more money in our present territory to attempt to hold our share of business, a number of discussions of that type.

"Q. Do you recall that a definite decision as to which course of action, which of those two courses just stated by you, was made by Falstaff management?

"A. Well, the course of action that we elected to follow was that of the need for expansion."

Your Honor, I will now read excerpts from the deposition of Harvey Beffa.

THE COURT: Harvey—

MR. SAGAT: Beffa—B-e-f-f-a—taken on April 27, 1967. Page 4, question 5:

"Q. In connection with your duties before the executive committee, has there been . . ."

THE COURT: Does it appear from that deposition what the position occupied by Mr. Beffa was at the time of the taking of the deposition?

MR. SAGAT: Your Honor, I believe that according to the stipulation in Exhibit 1 in this case Mr. Beffa was Chairman of the Board.

THE COURT: Chairman of the Board?

MR. SAGAT: He was also Executive Vice President.

[178] THE COURT: During the times involved here, 1967 and prior thereto?

MR. GORING: That is correct.

MR. SAGAT. [Reading]

"Q. In connection with your duties before the executive committee, has there been an occasion when there has been a discussion before that group with reference to the possible movement of Falstaff into the northeast, and I would qualify that statement by saying between the years 1955 and 1960?"

THE COURT: Between 1960 and 1965?

MR. SAGAT: Between 1955 and 1960.

THE COURT: '55 and '60.

MR. SAGAT. [Continuing]

"A. I don't recall if there was any discussion as related to any specifics but there's always been discussions over expansion, moving into various parts of the country."

Page 5, question 1:

"Has it been your understanding that the ultimate goal of Falstaff was to be a national brewer?

"A. Yes, sir."

[179] Page 6, questions 3 and 4.

"Q. Mr. Beffa, I show you Exhibit 34 and particularly the reference to the article relating to Falstaff.

"A. You want me to read it?

"Q. No, sir, just to yourself. Sir, I ask you to direct your

particular attention to the first paragraph at the head of the single column where it states: 'We plan to move northeast toward our remaining major sales frontier in this country. We plan to begin selling Falstaff in additional Ohio markets later this spring, Beffa disclosed.' Do you recall making that statement at that time, sir?

"A. I think I did, yes."

Page 10; questions 1, 2, 3, 4, 5, 6 and 7.

"Q. Would Falstaff be a large regional brewer?

"A. Yes.

"Q. Would there be certain advantages within the context of a national brewer that would inure to those people you consider to be national brewers that would not inure to the large regional brewer?

"A. Well, I would think so. Your advertising, your merchandising can be an item of value by [180] the expansion of coverage of TV and national media.

"Q. Is television advertising a large factor in the brewing industry?

"A. Yes.

"Q. Does Falstaff do quite a bit of advertising on TV?

"A. We do.

"Q. Is this restricted basically to its area that they are now selling in?

"A. In the regions, yes, sir.

"Q. Does Falstaff compete with all of those nationals you named in their current marketing areas?

"A. You mean do we compete in all the areas that the nationals cover? Is this your question?

"Q. Yes.

"A. No, we're not fully covered on the 50 states and they are, but we would compete with them in the states where we're operating in of the 50 states."

THE COURT: What is that again?

MR. SAGAT: The question is essentially—it starts off with the answer to question 6 on Page 10 where the deponent states:

[181] "You mean do we compete in all the areas that the nationals cover? Is this your question?"

The questioner says Yes. Then comes the answer:

"No, we're not fully covered on the 50 states and they

are, but we would compete with them in the states where we're operating in of the 50 states."

THE COURT: I think I understand the answer. He is merely saying they compete where they both operate in the same states.

MR. SAGAT: Yes.

THE COURT: Thank you.

MR. SAGAT: I will now read on Page 11, questions 1, 2, 3 and 4.

"Q. Do you find that they are in all the states that you sell in, all three of those nationals?

"A. Generally so, I would say so, yes.

"Q Has Falstaff been losing sales to these national brewers in the last two or three years?

"A. Yes, I think Falstaff has.

"Q. Has there been any discussion before the executive committee as to the means to stop this decline in sales in the last three years?

"A. Certainly there has been. The predatory price [182] practice of many of the nationals have been adverse to us in the economics of our operations, and there's always a discussion when your sales are declining as to what can be done to turn them around.

"Q. In that connection, were there discussions as to expansion into the northeast as a means to gain sales?

"A. Well, our policy, sir, as I said before, has been to expand and in the implementation of expanding we've got to look for certain opportunities. Certainly, the northeast has always been an objective in this national expansion, and when opportunities present themselves, as they did in the northeast and it being part of the objective, we went into the northeast."

I will now read selected questions from the deposition of Karl K. Vollmer—

THE COURT: Karl K. Vollmer.

MR. SAGAT: —which was taken on April 28, 1967.

Page 4, question 6.

"Q. Would you say that the national brewers—is that the name—have any advantages over the regional brewers that you have named—

[183] "A. Yes.

"Q. —by virtue of their being national?

"A. Yes.

"Q. Would you tell us what they are?

"A. Primarily their national image; people travel and they can know the name from one area to another, national advertising, many other subsidiary marketing advantages.

"Q. When you say a marketing advantage what do you mean?

"A. Well, their reputation in the business, the desire of distributors to become affiliated with them.

"Q. Is it important that a distributor want to become affiliated with a certain company?

"A. Certainly.

"Q. And a national brewer has this advantage?

"A. Yes.

"Q. By virtue of being national?

"A. Yes.

"Q. Would you tell us, in your capacity as a planning person, particularly from 1959 on, was it discussed by you with other members of management people?

"A. With what?

[184] "Q. Was it discussed by you with other members of management people, management staff at Falstaff, that Falstaff should try to become national to achieve these advantages?

"A. Yes; that was our mission."

Page 63, question 7:

"Q. You said earlier that one of the advantages of a national brewer as opposed to a regional brewer, in that general context, was the image which a national brewer had. I wonder if you would mind explaining that just a little bit further, what exactly you mean by image.

"A. What the public thinks of the brand name, and the corporate name, its success, it's—just because it's big it must be good."

Page 64; questions 1, 2 and 3.

"Q. When you say big, you mean available in more places?

"A. Geographically available, yes.

"Q. Is it hard for a regional brewer to project that same kind of image if it has a limited geographic range?

"A. In my opinion, yes.

"Q. Is there any other aspect of image besides availability?

[185] "A. Well, there probably are many of them. I don't recall them at the moment."

I will now turn to Page 6; questions 1 through 6.

THE COURT: Page what, again?

MR. SAGAT: Page 6.

THE COURT: Page 6; questions 1 through 6?

MR. SAGAT: Yes.

"Q. And how was it discussed; what methods were used by your people to achieve this desirable goal?

"A. By—by attempting to open new markets.

"Q. Now, when you say 'a new market' you mean geographic—

"A. Geographic spread; yes.

"Q —market? And when you say 'attempt to open a new market' what would that entail?

"A. That would entail obtaining new distributors, new areas, supplying them with advertising so that they will know the name of the brand, and appointing sales representatives of your own in that area.

"Q. Now, in the period of time that you were Planning Director now, from '59 on, were new markets of the kind you described opened by Falstaff?

[186] "A. Yes.

"Q. Could you tell us what they were?

"A. Well, those in the southeast, were those in the southeast, Cleveland, Cincinnati, Chicago, Detroit.

"Q. And each instance where a new market was being discussed as a desirable way to grow were there, was each area considered as a separate market from any other; in other words, did you feel that there were special things about each of these places that had to get specific consideration?"

Answer on Page 7:

"A. Certainly; yes."

I will now read on Page 7 questions 3, 4 and 5.

"Q. Now, if I may clarify the planning function at Falstaff, at what point in a discussion of opening a new market in terms of an attempt to meet your desires to grow—that was one—at what point were you involved and

what would be the kind of a recommendation that you would make?

"A. If the market is a contiguous kind, merely an extension of our existing markets, then it was purely the function of the Marketing [187] Department."

THE COURT: Of what?

MR. SAGAT: The Marketing Department.

"If it was a large area or entailed merging with another organizations then it became my job.

"Q. All right. Then would you tell us what areas then you, under your definition here of what it was that you would be likely to be involved in, what areas since 1959 were you involved in because it was a large area or because it involved a merging?

"A. You mean what companies?

"Q. No. I mean what areas. I think we—let's stay with areas for the time being—what areas of the country were you involved in because you would be called into play instead of the Marketing Department?

"A. Areas? Chicago, Wisconsin, New York, New England—I think that is it."

Page 8; questions 1, 2, 5, and 6.

"Q. Would you just clarify something; when you say New York, Mr. Vollmer, you mean New York City or New York State?

"A. New York City.

[188] "Q. Thank you.

"A. I think you might add Pennsylvania."

On Page 8, question 5:

"Q. Was there a policy in the company that extension into an adjacent area or contiguous area was to be the national way of expansion?

"A. No written policy per se; no formal policy per se; just good business.

"Q. Was that, in fact, how Falstaff did grow over a period of years?

"A. To a great extent with few exceptions."

Page 9; questions 1, 2, 3, 4, 5, 6, and 7.

"Q. Would you just tell me what were the exceptions that you can recall?

"A. California and, that was about the only one.

"Q. Can you tell if the national brewers have been increasing their shares of the market, of your market, in the last few years to your knowledge?

"A. Yes; I believe they have.

"Q. Has this occurred in areas in which Falstaff is also selling beer?

"A. Yes.

"Q. Was this increase by the national brewers a subject of discussion in your company and, particularly, with you in your planning capacity?

[189] "A. It did not directly involve me but I simply knew that as a fact, information that I obtained, would normally obtain.

"Q. Mr. Vollmer, you were considered by the Falstaff Company as a part of the management personnel, were you not?

"A. I believe so.

"Q. Was there any—were you a member of the Executive Committee?

"A. No.

"Q. Did you in your function as a planning vice president meet regularly with other members of the Falstaff management to discuss problems which, prior to their getting to the Executive Committe stage?

"A. Yes."

Page 10; questions 1 through 6.

"Q. Were you generally aware what was going to be submitted to the Executive Committee for discussion?

"A. Yes.

"Q. Was it ever your function to appear before the Executive Committee in terms of explaining or propounding some idea of yours or a proposed, proposal for the company?

[190] "A. Yes.

"Q. At what point did the increase—strike that. Did the increased competition from the national brewers in your area which you have mentioned earlier make inroads on Falstaff sales?

"A. I can't give any date of times of increasing pressure, all the time. I think it was probably felt, oh, in '57, '58.

"Q. Has that been a continuing thing from that period on?

"A. [Indicating Yes.]"

THE COURT: What is that?

MR. SAGAT: The deponent indicated Yes.

THE COURT: What do you mean: he indicated Yes?

MR. SAGAT: Apparently by shaking his head, I would imagine.

"Q. Now, was this—was there a concern in the company from '57 on about this increased competition of the national?

"A. Certainly.

"Q. Would you tell us what was being discussed in the company starting, if you want to, with 1957 as to what Falstaff would or could do to improve its own position and perhaps meet this problem?

"A. The problem, the matter of pricing, the matter [191] of strong advertising efforts, the matter of national image and how to combat those situations."

Page 11; questions 1, 2, 3, and 4 I will read next.

"Q. What were the ways that were discussed within the company as to how to combat?

"A. Image; how to get the status of our own advertising to combat the image. It was difficult to do on a regional basis. Two, on the pricing, whether to meet some of promotions that the premiums were putting on or to merely maintain our own price level, although we were being impinged upon by the premiums rather higher priced beer to start with; and, thirdly, how to get a greater usage out of our advertising dollar in order to compete with the advertising that they were—

"Q. Was the question of expansion either of production facilities or of extension into a new distribution system one of the ways that was discussed to meet these problems which you have just mentioned?

"A. Well, we were, our sales were enjoying increases at that time and production was a factor. However, the matter of increasing our [192] area was purely one of a matter of finding the proper distribution channels.

"Q. All right. Let me just ask you, when you said 'at that time,' at what time did you have in mind; are you talking from '57 on?

"A. Fifty-seven, '58 on, increasing.

"Q. Your sales were increasing from 1957. Was there a time when they stopped increasing or is that going on still?

"A. No; I think our sales—I don't remember exactly—but started diminishing or flattening out in '63, '64. In fact, I think they dropped in '64."

Page 12; questions 1, 2, 3, 4, and 5.

"Q. At the point at which your sales were increasing, were you looking at that point for ways to increase your production capacity to meet an expected increase in sales?

"A. Yes, in our existing plants.

"Q. The approach was to start with existing plants and see how they could be expanded to meet whatever demand was coming?

"A. Correct.

"Q. Would you then, if it were decided that this were not possible, would you then look to [193] other, to other means; is that what you are saying?

MR. FARR: I object to the question, as to what he, he would do. Go ahead and answer the question, if you can.

"THE WITNESS: Yes. As I recall, we didn't think the purchase of any plants just from the point of view of increasing our facilities—

"Q. When you say 'existing plants,' and you say 'expansion,'—

"A. Yes.

"Q. —do I understand you to mean that you would increase the capacity of a plant by making additions to your property or to the production equipment, or whatever it would be required?

"A. Correct. Your economies are entirely in that direction."

Page 13; questions 1 through 6.

"Q. Was that the way that Falstaff was moving in this period from '57?

"A. Yes.

"Q. Anything that was doing was in that line?

"A. Correct.

"Q. Taking an existing plant, making improvements?

[194] "A. Yes; that's right.

"Q. Now, is it not true that Falstaff has acquired properties over the years; is that correct?

"A. Which years are you talking about?

"Q. Well, since the beginning, since 1933.

"A. Yes, certainly. That was our method of growth.

"Q. All right. Am I to understand correctly to mean that when a plant was acquired this was decision that was made to add on to existing plants? What I really want you to do now, Mr. Vollmer, is explain to me, if you can, and if you want to limit to your period of time that you were involved, that's fine, when there was an acquisition that you knew of was it because the existing plant facilities were not expandable at that point, or was it more feasible to acquire rather than to expand? I'd like to get the procedure of the thinking at Falstaff as you know it.

"A. That's a highly complex question. I think that both things occurred to us. If we wanted to open a new area we would perhaps consider a plant closer to that area, if we could, if the economies were such that we could increase the size of our own plant and of the economies [195] of the increased production under one roof overcome the shipping costs, then we would increase the size of the plant, of the existing plant."

Page 14, questions 1 through 6.

"Q. When there was a discussion at Falstaff as to how to meet an anticipated increased demand, was it your function in the planning area to offer to the management people at Falstaff alternatives, alternative means, of achieving the desired goal of meeting demands?

"A. I would say that was true up until 19, perhaps '63, somewhere in there.

"Q. What happened in 1963?

"A. The function of projecting sales and of gathering together figures on the capacities of each plant went over to Mr. Gutting.

"Q. Was Mr. Gutting at that time reporting to you?

"A. No; he was doing other work through the Accounting Department and also working for Mr. Griesedieck.

"Q. Did Mr. Gutting ever report to you?

"A. We worked together to a great extent but he, he was not—

"Q. He was not taking direction from you?

[196] "A. No.

"Q. Did I understand you to say that after 1963 the function of suggesting alternatives to the management peo-

ple at Falstaff was more or less in Mr. Gutting's hands?"
Answer on Page 15:
"A. For existing plants; yes."

I will now read on Page 15 questions 1, 2, 3, 4, and 5.
"Q. For existing plants. This still left you with the function of looking at those kind of things for an expansion perhaps that did not involve existing plants?
"A. Right.
"Q. Did you work very closely with Mr. Griesedieck on all of your planning projects?
"A. Oh, yes.
"Q. Was it generally Mr. Griesedieck's policy to ask you to explore specific things which he had in mind and then have you come back and discuss it with him once you had the information, or were you the one who would suggest?
"A. Both.
"Q. Was it 50/50?
"A. I don't know.
[197] "Q. Mr. Vollmer, I'd like to go back to the area that you mentioned before. I believe it was in response to the question as to what areas you were involved in the planning of extensions before. If I remember, you said that you were involved in Chicago, Wisconsin, New York City, New England, Pennsylvania. In any of these areas that were mentioned were you, can you remember whether you were putting forth suggestions to Mr. Griesedieck about ways that this should be handled?
"A. We were giving each other our best judgment."

Page 16; questions 1 through 6.
"Q. Well, maybe it would be helpful for us if we asked you specifically about some of these areas. Could you tell us what was discussed between you and Mr. Griesedieck on, as to ways of, say, going into Pennsylvania?
"A. It wasn't the ways of going; we had a plan—I've forgotten the town in Pennsylvania that was offered us for sale and I was asked to check on it, which I did, and reported negatively.
"Q. When someone came to your company with the suggestion that perhaps you and they ought to [198] get together—
"A. Yes.
"Q. —it was Mr. Griesedieck's habit to ask you to go and check it and come back with a report?

"A. Yes.

"Q. Now, as to Pennsylvania, was there simply—was there one company that you have reference to now that you went to look at?

"A. Yes.

"Q. Would you just tell us what that was?

"A. I can't remember—I can't even remember the town.

"Q. Do you remember when that was?

"A. Probably in '61, '62."

Page 18; questions 2, 3, and 4.

"Q. Now, to get back to the areas that you mentioned before, I would like to ask you what was the interest of Falstaff from the period of time that you were planning man in the New England area; was there any interest?

"A. Well, it was an area which we were not in and which in our desire to become national we certainly had to explore.

"Q. Were you one of the persons in the company who was exploring—

[199] "A. Yes.

"Q. —this idea? Who else was exploring this besides; do you know?

"A. Mr. Griesedieck and myself.

"Q. Could you tell us what did you do in terms of exploring this area?

"A. Which area?

"Q. The New England area."

MR. SAGAT: I would like to withdraw that last question which I just read in. I read one extra question there.

THE COURT: Do you want it stricken from the record? Is that what you are saying?

MR. SAGAT: Yes. Is that possible?

MR. GORING: I am indifferent, your Honor.

THE COURT: There being no objection, the last question may be stricken.

MR. SAGAT: I will now read from the deposition of Charles William Dependahl, Jr., taken on May 1, 1967.

THE COURT: Would you be good enough to spell his last name for me, please?

MR. SAGAT: D-e-p-e-n-d-a-h-l.

THE COURT: May 1, 1967.

MR. SAGAT: On Page 2 I will read questions 1 through 6.

[200] "Q. Would you state your full name, please?

"A. Charles William Dependahl, Jr.
"Q. What is your address?
"A. 102 Claremont Court.
"Q. By whom are you present employed?
"A. Falstaff Brewing Corporation.
"Q. What is your position at Falstaff?
"A. Vice-President, General Marketing Manager.
"Q. How long have you been in that position?
"A. About two and a half, three years.
"Q. Would you tell us what your positions at Falstaff prior to that were?
"A. In which order, from bottom up or top down?"

On Page 3 questions 1, 2, and 3.

"Q. Would you start from the time you began to work for Falstaff, giving us the dates, if you will?

"A. I can't give you the dates. I can tell you in '36 I started as a trainee as a salesman. Some time after that, along about '40, I started traveling the United States, the army camps for Falstaff, which lasted until about '41, at which time I went to work for the government.

"MR. MCCLELLAN: What position with the [201] government?

"THE WITNESS: A pretty lowly one, in the service, a private, I was drafted. Following that I came back to Falstaff in about '45, '46, went to work as off-premise specialist in charge of off-premise sales. . ."

THE COURT: Off-premise specialist?
MR. SAGAT: (Continuing)

". . . Then I became Assistant General Division Sales Manager in the Central Division, later became Division Sales Manager, some time later Regional Sales Manager. I don't remember the dates on these latter ones, and then became Assistant General Sales Manager, then General Sales Manager, and later Vice-President and later the position was changed to General Marketing Manager.

"Q. That is the current position, General Marketing Manager?

"A. Right.

"Q. In that capacity, what are your major functions?

"A. To direct the field operations of Falstaff Brewing, in the field selling operations, which includes sales implemen-

tation, advertising implementation, the whole gamut of [202] field work."

Page 4; questions 1, 2, 3, and 4.

"Q. How many people report to you ultimately through this field operation?

"A. All of them, you mean directly or indirectly?

"Q. First indirectly, then directly.

"A. Indirectly, several hundred; directly, about eight or nine.

"Q. You say several hundred, do you mean five hundred?

"A. No, about two hundred.

"Q. And the eight or nine who report directly to you, could you tell us what their titles are?

"A. They are administrative assistants. There are three regional sales managers. There is a military representative. He handles our worldwide military sales. There's a special assistant to me who is an ethnics specialist. There is a technical specialist, a man by the name of Ulysses S. Gramsch."

MR. SAGAT: That is G-r-a-m-s-c-h. Page 5, questions 1 and 2.

"Q. Was the Sales Manager, New Market Operations, reporting to you?

"A. Yes.

[203] "Q. Did he work directly under your supervision?

"A. Yes, sir."

Page 6; questions 4 and 5.

"Q. You say that the position of sales manager, new market operations, was abolished?

"A. Yes.

"Q. Approximately at the beginning of 1966?

"A. Yes."

Page 7; questions 1, 2, 3, 4, 5, and 6.

"Q. What did the Sales Manager of New Market Operations do?

"A. He had many functions. He attended conventions, states in which we were not active, for the purpose of just going on a fishing trip, so to speak, to use a trite phrase. He would go into areas in which we were not at that time active but from which we had received inquiries regarding our product, those areas being immediately adjacent to our

current marketing area. And he would determine the sales ability, and when I talk about sales ability, let's say marketability of Falstaff in that area, look into the advertising phase, the price, the whole gamut of marketing area for us. [204] "Q. When he made such an investigation, did he report his findings back to you?

"A. Yes.

"Q. Did you then report those findings on to someone else?

"A. Right.

"Q. Who was that?

"A. Mr. Alvin Griesedieck, Jr.

"Q. Do you now report to Mr. Alvin Griesedieck, Jr.?

"A. Yes.

"Q. How long have you been reporting to him?

"A. Since I became General Sales Manager."

Page 8; questions 1, 2, 3, 4, 5, and 6.

"Q. Would that have been about two or three years ago?

"A. Yes.

"Q. Prior to that, to whom did you report?

"A. I was reporting to a Mr. Wightman. I was his assistant, Assistant General Sales Manager.

"Q. I believe you said a few minutes ago that the new market operation manager would go into an area to see about Falstaff possible operating ability there?

"A. Yes.

"Q. You used the term into areas immediately [205] adjacent to Falstaff areas, I believe?

"A. Yes.

"Q. Did the New Market Operations Manager ever go into areas that were not immediately adjacent to the areas that Falstaff already was in?

"A. It's possible. I don't know, I mean, we're getting into semantics, what was immediately adjacent.

"Q. What I mean, there was not another person designated to go into areas that were not immediately adjacent. I wanted to be sure as to this position, whether he was restricted to areas that were immediately adjacent.

"A. No, he wasn't particularly restricted. There was a judgment area here of what was practical and what was not practical."

Page 9; questions 1, 2, and 3.

"Q. In terms of the areas in which the New Market Op-

erations Manager would go, was that done in consultation with you as his immediate superior?

"A. Yes, then he exercised some authority. He had some authority on his own to pursue situations that might come up without necessarily having [206] to tell me about them, I mean.

"Q. What kinds of situation would he pursue without checking with you?

"A. He might decide to attend a convention in Wisconsin, just to have his feet on the ground, to have a feeling of that situation there. He might determine to do something in Pennsylvania of a like nature. He might get a lead to a good sales potential that existed in some other area that would—or, he could have been attending a convention in Pennsylvania as a case in point. He might have a lead on something over in Ohio and he'd drop over there because it was feasible as long as he was in the general area and he'd report back on these things.

"Q. Prior to his going, would you know that he was going into—

"A. I would have some idea, yes. We have an agenda that a man fills out. This man was responsible enough that you didn't dot every i and cross every t with him."

THE COURT: If you are going into something else, we will take a short recess at this point.

(RECESS.)

[207] MR. SAGAT: I would like to offer into evidence a Quarterly Report to the Stockholders for the period ending June 30, 1961, to be marked Government's Exhibit No. 20.

[Copy of Falstaff Brewing Corporation Quarterly Report to the Stockholders for period ending June 30, 1961, marked Government's Exhibit No. 20.]

MR. SAGAT: I would like to refer the Court in particular to Page 5 which is entitled "New Frontiers for Falstaff." There is a statement in it which reads:

"Thus it is that, although our goal is eventual national distribution, each move into new territory will be preceded by long months of careful research and planning."

And then on Page 5 to illustrate this proposition—the proposition that Falstaff's goal is eventual national distri-

bution—there is a map with arrows indicating the direction of expansion from Falstaff's present marketing area as of June 30, 1961, indicating the expansion to be achieved in the future.

I would like to read from the deposition of Joseph Griesedieck, taken on April 26, 1967, Page 146, questions 2 and 3.

"Q. Other than the fact that among these states that you were not selling, in addition to the [208] northeast, why was the northeast the logical move?

"A. Because as I stated earlier this is where the great potential of the whole beer market lay plus the desirability from a national standpoint at some point of being in this area. Many manufacturers identify nationally and what-have-you. The fact that you are in the State of Washington wouldn't make a national brand as much as the State of, say, the City of New York, or the New England area. It is where the people are, where the beer sales are.

"Q. From your knowledge of the brewing industry, approximately what percent of the beer consumption is represented by the northeast. By 'northeast' now, I adopt your definition of Newark, northeast."

THE COURT: Of what?

MR. SAGAT: "Newark."

THE COURT: You mean the City of Newark?

MR. SAGAT: That is what it says here.

THE COURT: Who says, "I adopt your definition"?—counsel?

MR. SAGAT: The questioner, yes.

THE COURT: Representing whom, the Government?

[208] MR. SAGAT: Yes.

THE COURT: "I adopt your definition of Newark, northeast."

MR. SAGAT: Yes. I might point out I suspect that the transcript conceivably could be in error and that the word "Newark," should mean the word "New York." I think that the answer of the deponent, which I will read, seems to indicate this.

Your honor, on the other hand, it is also conceivable and may be the case that "Newark" is right because I notice here in the answer to the question the State of New Jersey is also referred to. And I believe a number of brewers have

breweries in Newark, New Jersey, But I will read the answer.

"A. I can't give you an exact figure without referring to breakdown that we have. We have that information. I can only tell you, recall to memory that the State of New York, for example, sells ten percent of all the beer sold in the United States, so you add in New England and New Jersey, I would guess you'd come up close to twenty percent or more. Guessing—I'm guessing at this; I don't have the figures at hand."

Page 147; questions 1, 2, and 3.

[210] "So if one wants to be national, this is the place to be?

"A. Eventually.

"Q. Is that true?

"A. I would say yes. Eventually one has to be in this area to be national.

"Q. And it was discussed at the Board of Directors of Falstaff that eventually Falstaff wanted to be national?

"A. Correct, under the right conditions."

I would like to refer the Court to Government's Exhibit 6, which is supplemental interrogatory and the answer thereto, No. 6.

THE COURT. Government's 6, supplemental interrogatory 6?

MR. SAGAT: Yes.

THE COURT: Very well.

MR. SAGAT: That interrogatory states as follows:

"List and describe all reports, studies or surveys in the possession or control of Falstaff, prepared during the period January 1, 1960 to July 14, 1965, which relate or pertain to:

"(a) Competitive conditions in the brewing industry in the Northeast or any part thereof [211] and identify by name and address, the person, corporation or firm who prepared each such report, study or survey.

"(b) The share of the beer market in the Northeast or any part thereof possessed by any brewing firm or firms.

"(c) The volume of beer sales in the Northeast or any part thereof by any brewing firm or firms."

The answer to that supplemental interrogatory, I would

like really to point out, lists eight such studies or reports as requested in the interrogatory.

I would now like to read from the deposition of Joseph Griesedieck at Page 236.

THE COURT: Same date, same deposition?

MR. SAGAT: Yes.

THE COURT Go ahead. Page what?

MR. SAGAT: Page 236, Question No. 1. I am reading this to establish that Falstaff was a company that was on the wings or at the edge of the New England market.

THE COURT: Falstaff was at the edge?

MR. SAGAT: At the edge or what can be said to be the wings of the New England market.

[212] THE COURT: You mean, in other words, that it was selling its product in states adjoining the New England states?

MR. SAGAT: What I mean by that is that Falstaff was capable and interested in entering the New England market and would be waiting for the opportunity to develop, but that Falstaff, over the long term, would eventually or could eventually or was a likely entrant into the New England market, to use the terminology in *FTC v. Procter & Gamble Company.*

MR. GORING: Would you help me out, Mr. Sagat? Which answer are you referring to here?

MR. SAGAT: I am going to read on Page 236, Question No. 1 and the answer thereto.

MR. GORING: What were you doing a moment ago, explaining something?

MR. SAGAT: Yes, I was explaining to the Court the proposition that the Government intends to establish by reading this deposition excerpt.

MR. GORING: You weren't attempting to explain anything in the meaning of the deposition?

MR. SAGAT: No, I was not. I was going to introduce the excerpt.

MR. GORING: I understand.

THE COURT: Page 236, Question 1. Is that what you [213] are going to read to me?

MR. SAGAT: Yes.

THE COURT: Go ahead.

MR. SAGAT: [Reading]

"Q. I'm sorry, what Falstaff would do in entering the Northeast or New England market?

"A. Well, I don't know if there was any discussion but my recommendation would have been to the effect if this is not feasible then we just stay out until something develops because at that point we were already considering what a difficult problem we were having in Detroit, Cleveland, and I'm not sure about Cleveland, but Detroit particularly, we were concerned about our ability to open metropolitan markets on our own. I don't think anybody on our executive committee or management either would have ever condoned going into New England, New York as a new market operation out of our existing plants."

Then on Page 238, question 1.

"Q. It's your recommendation absent Narragansett's acquisition, you would have to wait?

"A. Definitely, wait until something else became available that had the same basic advantages."

[214] I will now read from the deposition of Joseph Griesedieck at Page 235. I will read questions 1 and 2.

"Q. Were there any negotiations during the period 1960-1965, January of '65 relating to possible acquisition, merger held with Piels?"

THE COURT: What is that last?

MR. SAGAT: Piels—P-i-e-l-s.

"A. I think we did talk to Piels somewhere at some point. I don't remember whether it was within those dates. I think Mr. Vollmer did. I didn't.

"Q. Did you have any contact, personal contact with the Piels people?

"A. I think at some point after they had been initiated, I did. I really don't remember."

I will now read from the deposition of Karl Vollmer at Page 22, questions 5, 6, and 7.

"Q. Can you tell me now, had you looked in terms of the possibilities of growth for Falstaff at any other companies in the eastern part of the United States prior to this Liebman?"

THE COURT. Prior to what?

MR. SAGAT: Liebman—L-i-e-b-m-a-n. It is the name of a brewery.

THE COURT: Give me that question again. I didn't [215] quite comprehend it. You were talking a moment ago about Piels; now you are talking about Liebmann. What is the context of the question?

MR. SAGAT: The next question, I think, will illustrate why there is a mention of Liebmann. Liebmann is just used in the question for introductory purposes by the Government attorney. In the answer to the next question—

THE COURT: Let's have this question again and see if I can understand this.

MR. SAGAT: Excuse me. Could we have a minute, please?

THE COURT: Certainly.

[A pause.]

MR. SAGAT: Your Honor, what the Government is endeavoring to show at this point is that Falstaff was so interested in entering the Northeast that over a period of five years, beginning about 1960, Falstaff conducted serious negotiations with three breweries in the Northeast; Ballantine, Liebmann, and Piels.

THE COURT: You have referred now to Piels—Narragansett and Piels.

MR. GORING: May I ask you, Mr. Sagat, if you are saying that is the purpose of this line of inquiry made by counsel in '67?

[216] MR. SAGAT. Yes.

MR. GORING: And that is the purpose of your offering it now?

MR. SAGAT: Yes.

MR. CODY: If I may, your Honor, in short, what we are attempting to show is a continuous long-range interest in brewing a national brand and entering the Northeast on the defendant's part. And we will introduce documents and deposition testimony showing that these negotiations were not merely flirtations, but serious, complicated, and detailed negotiations that took place.

THE COURT: I gathered that was the approach of the Government. But what I was confused about was merely the form of the question which counsel read. Out of the blue it made mention of Liebmann; that is all. There were no introductory questions or answers to bring us up to that point. That is what confused me. But go ahead. I think I can understand. I will do my best.

MR. SAGAT: [Continuing]

"Q. Can you tell me now, had you looked in terms of the possibilities of growth for Falstaff at any other companies in the eastern part of the United States prior to this Liebman?

"A. Yes.

Q. "And could you tell me what they were?

[217] "A. The Piel, P-i-e-l.

"Q. Could you tell me when was that?

"A. Oh, that was prior to the Haffenreffer."

Page 23; questions 1, 2, 3, 4, and 5.

THE COURT: Now "prior to the Haffenreffer" presumably means prior to Narragansett?

MR. SAGAT: Yes. During this five-year period Falstaff engaged in discussions with Ballantine, Liebmann, Piels. It also, as you know, acquired Narragansett; but prior to the acquisition in 1965 it had in the early sixties conducted negotiations with Narragansett also.

THE COURT: What is the question you started to read when I interrupted you?

MR. SAGAT: I will now go on to Page 23, question 1.

THE COURT: Page 23, question 1.

MR. SAGAT: [Reading]

"Q. That was before 1961?

"A. Yes."

THE COURT: When you say, "That was before 1961," do you mean negotiations with Liebmann or negotiations with Ballantine or Piel? What do you mean?

MR. SAGAT: Now I believe he is referring to negotiations with Piel and he is saying that those occurred prior to the Haffenreffer, and that was before 1961.

MR. GORING: If the Court please, I do not recognize [218] the right of the Government to tell us what the language of a witness in a deposition means. I cannot be helpful because I was not there and I did not see these depositions until 1968—late 1968. So I cannot be helpful.

THE COURT: Are you following the reading of the deposition?

MR. GORING: We are at table here, yes. I am familiar with it.

THE COURT: The question that was read seemed a little

—perhaps I misunderstood it. I wanted to get in my own mind just what that question was again.

Page 23, question 1. Let's have that, would you, please?

MR. SAGAT: [Continuing]

"Q. That was before 1961?"

THE COURT: Let's have the preceding question. That might clear it up.

MR. SAGAT: [Reading]

"Q. Could you tell me when was that?"

THE COURT: Let's go back another question and see what we are referring to here.

MR. SAGAT: [Reading]

"Q. Can you tell me now, had you looked in terms of the possibilities of growth for Falstaff at any other companies in the eastern part of [218] the United States prior to this Liebman?"

The witness answers "Yes."

"Q. And could you tell me what they were?

"A. The Piel, P-i-e-l.

"Q. Could you tell me when was that?

"A. Oh, that was prior to the Haffenreffer.

"Q. That was before 1961?

"A. Yes."

THE COURT: I think that clarifies the situation. Negotiations with Piel or the approach to Piel was before 1961.

MR. SAGAT: Yes.

THE COURT: Very well.

MR. SAGAT: I am now on Page 23 and I will read questions 2, 3, 4, and 5. I have just read question 1.

"Q Was it 1960?

"A. [No response.]

"Q. Now, how did the Piel situation come to the forefront?

"A. I've forgotten the name of their president but he came out to see us. They were not doing too well, wanted us to look into the situation.

"Q. Did you look into the situation?

"A. I did.

"Q. When I say 'you' I mean yourself, sir.

[220] "A. Yes"

I will now refer to the deposition of Fred Gutting, taken on May 1st, 1967. I will read question 1 on Page 15.

"Q. Do you have any knowledge of what the San Diego situation was as referred to in that paragraph?

"A. I presume the reference is to the fact that Falstaff had lost money in the San Diego market."

Page 16; questions 1, 2, 3, 4, and 5.

THE COURT: Page 16?

MR. SAGAT: Page 16.

"Q. Did someone at Falstaff authorize you to go to the Piels plant and inspect them?

"A. Yes.

"Q. Who was that person?

"A. Mr. Joseph Griesedieck.

"Q. Did Mr. Joseph Griesedieck give you specific instructions relating to this trip?

"A. Yes.

"Q. What were those instructions?

"A. To make a cursory examination of both plants and advise him of my findings.

"Q. When you say both plants are you referring to the Piels plant in Brooklyn and Willimansett, Massachusetts?

"A. Willimansett."

[221] THE COURT: Willimansett?

MR. SAGAT: I now refer to the deposition of Joseph Griesedieck.

THE COURT: Is there a time fixed for this authorization in that deposition? You asked the witness if he was authorized—

MR. SAGAT: Yes, the time can only be fixed by reference to a statement by the Government attorney which refers to Plaintiff's Exhibit No. 49 in the depositions, which is a report of Mr. Gutting's visits to plants in Brooklyn and Willimansett, Massachusetts. And the date of that report is April 16, 1964.

THE COURT: Gutting's report is dated April 1964. Very well; go ahead.

MR. SAGAT: I now refer to the deposition of Joseph Griesedieck at Page 116; questions 1, 2, 3, and 4.

"Q. Was there a particular reason why you wished to acquire a brewery of a million and a half barrel capacity at this time?"

THE COURT: What time is being fixed there?

MR. SAGAT: The time is not fixed, but in this answer to a question it is in reference to negotiations between Falstaff and Liebmann.

THE COURT: Let's have the question again.

MR. SAGAT: I believe that subsequent questions will [222] point out that the time was in 1962, more approximately then.

"Q. Was there a particular reason why you wished to acquire a brewery of a million and a half barrel capacity at this time?

"A. As I stated earlier, we were not really trying to acquire a brewery of capacity. We were trying to acquire a brewery of a going brand with a strong distributor organization. The fact they were selling 1,300,000 barrels, or a million and a half really meant that it did allow an awful lot of extra capacity for Falstaff but we would be able to operate it at a pretty good operating ratio but this was not the prime consideration. We were not looking for capacity as such in New England.

"Q. Are you familiar with the name of Mr. Suslak?

"A. Yes. Howard Suslak?

"Q. Yes. And who is Mr. Suslak?

"A. Mr. Suslak, I guess you'd call him a developer of mergers or promoter. I don't know what he calls himself.

"Q. Did you have occasion to deal with Mr. Suslak in the Liebmann negotiation?

"A. Yes."

[223] Page 117; questions 1, 2, and 3.

"Q. In 1962?

"A. Approximately then, yes.

"Q. Did Mr. Suslak represent Liebmann?

"A. At the start, as I recall at the initial contact, it was made by Mr. Suslak, he indicated that he was. Subsequently I found out that he was just trying to develop any merger, which later on I think there was a personal contact by the president in which he indicated that he had authorized him somewhat halfheartedly to look around. It wasn't quite accurate that he was representing Liebmann. I think

it ended up that he was an independent, a guy trying to put two people together."

At this point I would like to offer into evidence a letter dated June 22, 1962, addressed to Mr. Howard Suslak, McDonald and Company, 54th and Madison, New York, New York, and signed "Joseph Griesedieck."

THE COURT: It may be marked Government's Exhibit 21.

[Copy of letter dated June 22, 1962, to Mr. Howard Suslak from Joseph Griesedieck with two copies of suggested statement of understanding attached, marked Government's Exhibit No. 21.]

[224] MR. SAGAT: In the deposition excerpt which I will read this letter, which I have just offered into evidence, is referred to as Exhibit No. 8, as a deposition exhibit.

THE COURT: It has now become Government's Exhibit No. 21.

MR. SAGAT: Page 117, Question No. 3.

"Q. Take a look at that Exhibit No. 8, Mr. Griesedieck. Directing your attention, sir, to the opening sentence, and I quote: 'At our Board meeting this morning, I recommended that our original offer to Liebmann as outlined in previous correspondence with you be improved as follows:.' Do you recall that an offer was actually made to Liebmann?

"A. Yes."

Page 118, questions 1 and 2.

"Q. Do you recall the amount of that offer?

"A. Initially this was in the form of exchange of stock. I don't remember the total amount. I'd have to refresh my memory on the file. The ultimate figure that I think we finally made was in the area of $26,000,000. I think the initial figure was something less than that.

"Q. Do you recall dealing with Mr. Suslak on this merger?

[225] "A. Yes, I do recall it. He contacted me. I can't remember the date, some time early in '62, indicated he thought a merger could be arranged with Liebmann. I asked him, as I said earlier, whether he was representing them. He indicated he was and we found out later he wasn't, he was a sort of an independent and later on at the

conclusion I would suppose that we felt that since in the long run we were going to have to pay the fee, anyway, we arranged a fee arrangement with Suslak to represent us at the final termination of this thing because it began to approach a point where the direct meetings between us were not producing results but the initial meeting with Suslak occurred somewhere in '62. He contacted me on this as a possibility to develop and from that point on, we were introduced to Bemberg as chairman of Liebmann and discussed the possibilities which developed into an offer."

I would like to offer as Exhibit 22 a memorandum entitled "Chronology of Events, etc., in L Negotiations."

THE COURT: What is that again: "in L"?

MR. SAGAT: "... in L Negotiations."

[226] THE COURT: ".. in L Negotiations."

MR. SAGAT: There is also a date in the upper right-hand corner: 4/30/63.

THE COURT: Is that memo signed by anyone or identified otherwise?

MR. SAGAT: In the depositions I believe that there is discussion that the "L" refers to Liebmann. And I will read—

THE COURT: Whose memorandum was it, as appears from the transcript of the deposition?

MR. SAGAT: Joseph Griesedieck's.

THE COURT: Was it identified by him as being his memorandum?

MR. SAGAT: Yes, I would like to read from his deposition, Page 147.

THE COURT: Government's 22. There is no objection by Mr. Goring, I take it.

MR. GORING: No objection, your Honor.

THE COURT: I was just inquiring out of general curiosity who is the author of this document; that is all.

MR. GORING: I have no doubt "L" is a cryptic method of referring to Liebmann which other people are not supposed to understand.

THE COURT: I accept the representation of counsel. If this is a memo made by Mr. Griesedieck, you needn't [227] hesitate on it. Go ahead.

[Copy of memorandum entitled "Chronology of Events, Etc., in L Negotiations" dated 4/30/63, marked Government's Exhibit No. 22.]

MR. SAGAT: This memorandum was Plaintiff's Exhibit 13 in the depositions.

THE COURT: It now becomes Government's Exhibit 22 here.

MR. SAGAT: What I am talking about is the number of the exhibit when the depositions were taken.

MR. GORING: That is the same one you are now proposing to introduce.

MR. SAGAT: Yes.

THE COURT: As I understand it, gentlemen, the memorandum was marked Government's Exhibit 13 in connection with the deposition. That same document has now become Government's Exhibit 22 in this hearing.

MR. SAGAT: Yes. Page 147, question 4.

"Q. Mr. Griesedieck, I show you Exhibit 13, if you will take a look at that, sir.

"A. When you were mentioning this as an exhibit, e-t-c, I was trying to remember whose initials stood for. I didn't realize it was just et cetera. Yes, I've seen it.

"Q. I state, sir, that we're not going to go into [228] that in great detail.

"A. I say I wish you had given me this earlier. It would be a lot easier in remembering dates.

"Q. Well, I was going to ask you if that was not a record dictated by yourself?

"A. That is correct."

Page 148; questions 1, 2, 3, 4, 5, 6, and 7.

"Q. And, again, this involves an instance when you were contacted by the other company to see if you were interested in advising them?

"A. That's right."

THE COURT: In advising them?

MR. SAGAT: It is clarified in the next question, your Honor.

"Q. Acquiring them.

"A. That's right.

"Q. Initially, the first notes on this sheet, 5-23-57, you advised the people at Liebman that you were not interested.

"A Not Liebman. We were contacted by Evans and Company just to see if there was anything we wanted to explore and we said we were not interested."

THE COURT: Evans?

MR. SAGAT: Evans and Company.

[229] "Q. Was just a general approach?

"A. We had no knowledge whether they had represented or not. We just weren't interested.

"Q. So it never really resolved around whether you were interested in acquiring Liebman in 1957?

"A. That is correct.

"Q. The next time that Liebman arose was in 1961 when you were contacted by Mr. Suslak; is that true?

"A. That's right; that's right.

"Q. Now, did Falstaff make an offer to Liebman in an attempt to acquire their brewery subsequent to your original contact in 1961?

"A. With any specific time or just subsequent to it?

"Q. Well, subsequent to the time that the company was brought to your attention in '61 as being interested in that position."

This is on Page 149, question 1 I just read. I will now read questions 2, 3, and 4.

The answer to question 1:

"A. Yes. Subsequent to that time, after a series of meetings, we made an offer to Liebman.

"Q. Did members of the Falstaff Corporation [230] inspect the Liebman facilities?

"A. At some point, yes; I can't remember which one.

"Q. Was there a report made back to the Executive Committee as to the desirability of the plant or the condition of the plant of Liebman?

"A. Yes; there was a report made back which showed the condition of the plant, also indicated what would have to be done to the, certain facets of it to rehabilitate it at some point in time.

"Q. Was the report of such a nature that the Executive Committee decided that they wanted to go forward seriously with acquiring the Liebman Brewery?

"A. At the right price; yes."

THE COURT: I think it is 12:30, gentlemen. It appears to be. We will stop here for luncheon and resume at 2 o'clock.

[NOON RECESS.]

[231] *AFTERNOON SESSION*

2:00 p.m.

MR. SAGAT: Your Honor, this morning when we adjourned the Government was introducing evidence regarding Falstaff's discussions with the Liebmann Breweries with regard to acquiring Liebmann. I would like the Court to refer to Exhibit 22, which is a Chronology of Events, etc., in L Negotiations—it is entitled. I would like to point out that this Chronology of Events begins on 5/23/57 and continues to 4/30/63. It began on 5/23/57; the notation, "Contacted by Evans & Company to see if interested in L —advised no."

The fourth entry, 12/6/61, reads: "Meeting in New York with Babb and Bemberg."

THE COURT: With whom; meeting with whom, please?

MR. SAGAT: Babb—B-a-b-b—and Bemberg. "General discussion of benefits to be gained by both companies from merger, etc. Requested additional information on L financial results, etc."

Then there is a further notation, 4/11/62, with two notations of 1/30/62 and 3/6/62.

On 4/11/62 there is a notation: "Met with Bemberg (in St. Louis, I believe), at which time Falstaff offered to acquire L on following basis:

[232] "(a) 184,000 shares F common stock, plus

"(b) 184,000 shares 3% convertible preferred ($50 par) —convertible after 3 years into 1.1 shares of F common."

A further notation, 5/17/62:

"Meeting in New York with Bemberg, Suslak, Phil Liebmann, Graham Madison and myself. After much discussion, I submitted following offer which I advised I would recommend to F board for acceptance:

"(a) 552,850 shares of 3% convertible preferred ($30 par), convertible after 3 years into 386,400 shares of F common (approximately 7/10 share F for each share of L). Plus

"(b) Conversion into additional 3/10 share of F based upon an escalator schedule of L earnings (details in my file)."

Then further on, 7/2/62:

"Suslak advised that he had submitted the revised offer

and statement of understanding to Bemberg, but latter stated that since several L Board members were [233] unavailable for several weeks, he was not in position to give us an answer. I advised him we had to have an answer prior to F Board meeting on 7/23/62; otherwise, I planned to recommend to the Board that our offer be withdrawn and negotiations be terminated."

Further on, 8/2/62:

"Meeting with Bemberg in New York City. I offered exchange of 1 share F for 1 share of L, with exchange of convertible preferred for their preferred. He countered with following: He would submit our offer to his Board prior to August 25th meeting. In meantime, if price of beer increases, he wants 2 for 1."

Further on, 2/25/63:

"F Board authorized me to make final offer of 1-1/4 share F for 1 share of L."

Further on again, 3/25/63:

"Submitted statement of understanding to Bemberg. Statement revised slightly and amended form signed on 4/1/63."

I would like to introduce into evidence a letter dated April 1, 1963, to Mr. Joseph Griesedieck from Edward P. Bemberg, and attached to the letter is a statement of understanding reached in negotiations between Liebmann and Falstaff.

THE COURT: It may be marked Government's Exhibit 23.

[234] [Copy of letter dated April 1, 1963, to Mr. Joseph Griesedieck from Edward P. Bemberg, and attached Statement of Understanding Reached in Negotiations Between Liebmann and Falstaff, marked Government's Exhibit No. 23.]

MR. SAGAT: I will turn to Page 162—excuse me—167 of the deposition of Joseph Griesedieck, taken on April 26, 1967; questions on that page 1, 2, 3, 4, 5, 6, and 7.

"Q. Mr. Griesedieck, I show you Exhibit 17 and ask you to read that document."

MR. SAGAT: Exhibit 17 is Government's Exhibit 23 in this case.

"A. Yes.

"Q. I ask you, sir, if you recall receiving this letter?

"A. Yes.

"Q. Mr. Bemberg was the chief executive officer of the Liebman Brewing Company, was he?

"A. Yes, he was chairman and chief executive officer.

"Q. And the enclosure is noted on the letter entitled 'Statement of Understanding Reached in Negotiations Between Liebman and Falstaff.' That is also a document that you are familiar with?

[235] "A. Yes.

"Q. And is that your signature for the Falstaff Brewing Corporation?

"A. Yes.

"Q. And that understanding is dated March 25, 1963?

"A. Yes.

"Q. And does that statement, in effect, agree to a merger between the two companies?

"A. Yes. We had a memorandum of understanding subject to approval of the two Boards of Directors that this exchange of shares, as outlined here, was agreed to as a merger when the two companies—"

I will now go on to Page 168, question 1.

"Q. And was—was this understanding, in fact, proffered to both boards, both boards of Directors?

"A. Profit?

"Q. Was it offered?

"A. Oh, offered—I'm sorry.

"Q. To both boards?

"A. Well, I presume it was. I can't remember at what point it was; I'd have to check with the minutes of our board meetings.

"Q. Do you recall whether or not the Board of [236] Directors of Falstaff approved this understanding as it is set forth here?

"A. I would have to assume it did. I don't recall again without reference to the board minutes.

"Q. Did this merger, in fact, take place?

"A. No.

"Q. What was the reason that it did not take place, or reasons?

"A. Well, I don't remember chronologically why, but other, another offer was made at about this time or some, at some point by another party which was accepted by Liebman. Now, what happened between, I'd—I'd have to again look at the file to refresh my memory; I can't recall."

Now turning to Page 187, I will read questions 3 and 4.

"Q. At the time of our adjournment yesterday you were uncertain as to whether or not this statement of understanding had been presented to the board of directors of Falstaff. I ask you now, sir, whether or not you have been able to determine that fact?

"A. Yes, this was presented to the board.

"Q. Was this approved by the board of Falstaff?

[237] "A. Yes."

Page 188, questions 6 and 7.

"Q. But this merger did not, in fact, take place?

"A. No, it did not.

"Q. Have you been able to refresh your recollection as to why it did not?

"A. Yes, I can advise you between, let's see, this was dated March 25. After this memorandum of understanding was accepted, both parties proceeded to obtain additional information in detail about each other, and I mean a plant inspection. They wanted information from us on our setup and through the course of a period between this date and about August, I guess, much more of this information was developed. In September we sent Mr. Wemhoerner and Mr. —I can't remember who went with him, but anyway perhaps one of his assistants, up to review with their treasurer their projections for the year. They returned and we were certainly disappointed in the projections because we had been led to believe in the earlier part of the year when we made this offer that their earnings were going to be substantially better than this. At that point we felt that it was necessary to [238] reduce our offer to the original offer which we had made based on what we had felt their earnings to be, which was approximately one for one, as I remember. They felt this was unsatisfactory. At this stage of the game we announced publicly that we had terminated our negotiations. Subsequent to that, in about—later in

October, '63, Mr. Suslak attempted to revive these through an approach, a different approach, and that was on a cash basis. And he had negotiated—not negotiated, but inquired of several of the large life insurance companies as to whether a loan could be obtained to finance this thing on a cash basis. He felt reasonably certain it could be done and urged us to make an offer on a cash basis. At about this point, I think it was around the first of 1964 we had become rather disenchanted with the whole thing, and felt that this had been dragging along so long that we began to get a little concerned, and as a result did not proceed. And in February, the 28th, I think of '64 the Pepsi-Cola United people made a similar offer, I say similar in the sense that this [239] would have been an offer we would have been making if we had made it, of something around twenty-six million dollars, and it was accepted, by Liebmann. At that point, of course, we just closed the file."

Page 190, No. 1.

"Q. What was the date?

"A. February 28, 1964."

THE COURT: That is the date of the closing of the file or what is it?

MR. SAGAT: Yes, that refers immediately to the last sentence in that question.

THE COURT: February 28, 1964.

MR. SAGAT: Page 162, Question 1:

"Q. In connection with the Liebman discussions and negotiations, did you at any time examine their distributor system?

"A. Well, Liebman's principal business was in the New York, Metropolitan New York market. They were distributing the great majority of their business through their own branches. They didn't have a big distributing organization, very limited. It was primarily in the New England market and in the New Jersey market, but I would say the great bulk of their business [240] was in Manhattan, Long Island, Queens, the Metropolitan New York area. This subsequently became one of the concerns we had because they were so concentrated in the New York market and the market was moving to the suburbs, which has happened in a lot of places, urban areas. Let me add, we did

have a list of what distributors they had but that's about all we had."

I would like to turn to the deposition of Karl Vollmer, Page 33.

THE COURT: Karl Vollmer.

MR. SAGAT: On Page 33 I will read questions 1 through 6.

"Q. At the time that you met with Mr. Bemberg in New York in July of '62, was Falstaff actively interested in the possibility of going ahead with Liebman?

"A. Yes.

"Q. What were the reasons why you were interested in Liebman?

"A. We were interested in Liebman because it would allow us access to the biggest market in the United States.

"Q. What market is that?

[241] "A. New York City.

"Q. Was that the primary reason?

"A. Primary reason.

"Q. Prior to this negotiations with Liebman had it been discussed in the company that it would be desirable to be in New York City?

"A. Yes.

"Q. Had it been discussed—strike that. Had possibilities of ways of getting into New York City been discussed?

"A. Yes."

I would like to offer as Exhibit 24 a list and data schedule—

THE COURT: List and—

MR. SAGAT: —schedule of data entitled "RE: L. B., Inc."

THE COURT: There being no objection, it may be marked Government's Exhibit 24.

MR. GORING: No objection.

[Copy of list and data schedule entitled "RE: L.B., Inc." marked Government's Exhibit No. 24]

MR. SAGAT: I would like to point out that on the first page of this document, under—

THE COURT: This is Exhibit 24?

MR. SAGAT: Exhibit 24, yes.—under "Assumptions" [242] there is a series of numbers which appear to state the price that Falstaff would pay for Liebmann and the sum of those numbers is $26,080,920.

I would like to offer a Quarterly Report to Shareholders for the Period Ending June 30, 1963.

THE COURT: The shareholders of Falstaff, you mean?

MR. SAGAT: Yes.

THE COURT: What is the date again?

MR. SAGAT: For the period ending June 30, 1963. The date of the report is July 10, 1963.

THE COURT: It may be marked Government's Exhibit 25.

[Copy of Quarterly Report to Shareholders for Period Ending June 30, 1963, Falstaff Brewing Corporation, marked Government's Exhibit No. 25.]

MR. SAGAT: On the second page of Exhibit 25 I would like to read three paragraphs.

"On June 11 we issued a statement regarding discussions between Falstaff Brewing Corporation and Liebmann Breweries, Inc., of Brooklyn, N.Y., about a merger of the two firms.

"These discussions are presently continuing, and if they lead to an agreement to merge, the plan would be first subject to the approval of the boards of directors of both firms. Following such approval, the next step would be to provide [243] you, the Falstaff shareholder, with the merger proposal, and a proxy which would be voted at a special meeting later this year.

"Should the merger be completed, it would be our plan to continue the aggressive merchandising of Liebmann's Rheingold beer in its current marketing area in the northeastern United States. Such a merger as the one under discussion would bring Falstaff closer to its goal of eventual national distribution."

I would like to offer as Government's Exhibit 26 a document entitled "Excerpts from Executive Committee Meeting Minutes."

[Copy of document entitled "Excerpts from Executive Committee Meeting Minutes" marked Government's Exhibit No. 26.]

MR. SAGAT: In Exhibit 26 there is reference to the Executive Committee's consideration of the Liebmann negotiations.

I would like to offer as Exhibit 27 a memorandum dated December 9, 1963.

THE COURT: It may be marked Government's Exhibit 27.

[Copy of memorandum dated December 9, 1963, marked Government's (Personal) Exhibit No. 27.]

MR. SAGAT: I will now read from the deposition of [244] Joseph Griesedieck at Page 127, question 1.

"Q. In 1963, did the Falstaff Corporation have discussions with Ballantine about the possibility of an acquisition or a merger?

"A. We had discussions with Ballantine around '63 or '64. I don't remember exactly when."

I will now read from Page 128 of that deposition; questions 1, 2, and 3. What I will read in the question refers to Exhibit 27 that I have just offered into evidence.

THE COURT: The page again, please?

MR. SAGAT: Page 128.

THE COURT: Questions 1, 2, and 3, did you say?

MR. SAGAT: Yes.

THE COURT: It refers to Exhibit 27?

MR. SAGAT: Yes.

"Q. Directing your attention, sir, to page 1, which is entitled, 'Proposed East-West Company Combination, I. Suggested Purchase Price,' and listed there is 43.5 million dollars suggested as a purchase price for East company. Do you recall that as being a price that was suggested to the Executive Committee?

"A. Well, Mr. Eberstadt, who composed this memorandum is a broker and again representing, I'd suppose you say he's playing an independent [245] role, and he submitted this to us as a suggestion, which I'm sure with this file, as you say, was submitted to the Executive Committee for analysis, is that what you're asking me?

"Q. Yes. Was that document then discussed before the Executive Committee?

"A. Certainly.

"Q. Was any action taken on that recommendation?

"A. I can't recall dates again. This is again an instance where the Ballantine people came to us proposing that we take a look at the combination of the two companies. We did not enter into it with really any serious note because it

didn't seem possible to us it could ever be put together but we did agree to look at it. We agreed to have an independent individual such as Mr. Eberstadt, because here again there was a reluctance on the part of Ballantine to have us look at the figures. We agreed to have him look at both sets of figures and put together what he considered to be a fair deal. To the best of my recollection, this was reviewed with the Executive Committee and a decision was made [246] to make one further meeting and point out that without an analysis of their figures, we were not in any position to make any kind of an offer. We didn't know if this was fair enough or not, not having any access to their detailed figures. We were not really too vitally interested because we didn't think there was any real way to do this."

Page 129; questions 1, 2 and 3.

"Q. Directing your attention to the last page in that sheet of paper therein, Exhibit 10, and it's after page 5—"

THE COURT: Exhibit 10, once again, is Exhibit 27 before the Court?

MR. SAGAT. Yes.

THE COURT: All right.

"MR. MCCLELLAN: You mean on the back?

"Q. Yes, is that handwriting familiar to you?

"A. That's mine.

"Q. That is your handwriting?

"A. Right."

Page 133, question 4.

"Q. In other words, the $35,500,000 offer would have had to have been approved by the Executive Committee before you would offer it?

[247] "A. Well, this meeting was, on 12/12 was—in effect represented an Executive Committee Meeting in the sense that we were meeting with them and in the course of the discussion retired and came up with this figure. I don't think this had been pre-arranged, frankly."

I would like to offer as Exhibit 28 an office memorandum dated February 18, 1964, to which is attached a proposed letter to the Honorable William H. Orrick, Assistant Attorney General, Department of Justice, Anti-Trust Division, Washington 25, D.C.

THE COURT: Letter to—

MR. SAGAT: The Honorable William H. Orrick.

THE COURT: How do you spell that?

MR. SAGAT: O-r-r-i-c-k. Assistant Attorney General, Department of Justice, Anti-Trust Division, Washington 25, D.C.

THE COURT: Exhibit 28.

[Copy of Falstaff Brewing Corporation office memorandum, dated February 18, 1964, with attached proposed letter to Honorable William H. Orrick, Assistant Attorney General, Washington 25, D.C., marked Government's Exhibit No. 28.]

MR. SAGAT: The first paragraph of the attached letter in Exhibit 28 reads:

"This letter is a joint communication of [248] Messrs. Gallop, Climenko, and Gould—"

THE COURT: Of whom, please?

MR. SAGAT: Gallop, Climenko, and Gould.

THE COURT: I didn't get the first name.

MR. SAGAT: Ga-l-l-o-p.

THE COURT: The second one?

MR. SAGAT: Climenko—C-l-i-m-e-n-k-o.

THE COURT: And Gould?

MR. SAGAT: And Gould.

"—360 Lexington Avenue, New York 17, New York, attorneys for P. Ballantine & Sons, Newark, New Jersey, and Willson, Cunningham & McClellan, 1930 Boatmen's Bank Building, St. Louis 2, Missouri, attorneys for Falstaff Brewing Corporation, St. Louis, Missouri."

On the third page of the proposed letter there is a section called "Reasons for the Proposed Merger." This section reads in part as follows:

"The advantages of the proposed transaction to the two Companies involved are primarily defensive in nature. Falstaff, despite its growth and development since 1933, is still only a large regional brewer. It is too heavily dependent upon a relatively small marketing territory and this makes it dangerously vulnerable [249] to the inroads of competition, particularly by the national brands. This competition is expected to increase. Just two items of evidence in this connection are the construction by Anheuser-Busch of a

million-barrel brewery in Houston, which is now underway, and the recent construction by Carling of a million-barrel brewery in Fort Worth. To gain greater stability, it is essential that Falstaff expand its marketing territory and the logical direction of such expansion is the northeastern section of the United States. This can be accomplished at far less cost and with much greater assurance of gaining a foothold if undertaken through the proposed joinder with Ballantine. Ballantine's brewery in Newark, N.J., has adequate capacity for the production of Ballantine beer and ale and for the production of such amount of Falstaff as may be required for the northeastern markets. Through Ballantine's distribution system, Falstaff could be gradually and relatively inexpensively introduced in these markets. . ."

I would like to read from the deposition of Joseph Griesedieck—excuse me—from the deposition of Harvey [250] Beffa, Page 29.

THE COURT: Once again, the date on that is what?

MR. SAGAT: That is April 27, 1967.

THE COURT: Page 29, questions what?

MR. SAGAT: Questions 3, 4, 5, and 6.

"Q. I show you Plaintiff's Exhibit No. 12, Mr. Beffa, and I note that it has a checkmark next to your name. I ask you to read that, please, to yourself. Sir, do you recall having seen that document?

"A. Yes, sir, I recall seeing it.

"Q. Did you see this in connection with the executive committee?

"A. Yes, sir.

"Q. What this presented before the executive committee at a meeting?

"A. I don't recall specifically so, but if my memory serves me correctly, this letter never went out. This was a suggested letter, but I would believe that, again calling upon memory, that this deal never got to the point where that letter went out.

"Q. Directing you attention, sir, to Page 3 of that letter, under the sub-caption of 'Reasons for the Proposed Merger' and I quote, it [251] states therein: 'It is too heavily dependent upon a relatively small marketing territory—"

THE COURT: You mean Falstaff?

MR. SAGAT: Excuse me?

THE COURT: You mean Falstaff when you used the word, "it"?

MR. SAGAT: Yes.

THE COURT: It is dependent upon the what?

MR. SAGAT: [Continuing]

"'. . .relatively small marketing territory and this makes it dangerously vulnerable to the inroads of competition, particularly by the national brands.' Did you at that time consider that statement to be true?"

Now, on Page 30—

THE COURT: Was that question answered? "Did you consider that statement true?" Was that a question?

MR. SAGAT: That is a question. The answer is on Page 30.

"A. Let me see what you quoted there. Where do you start?"

Then on Page 30 I will read questions 1, 2, 3, 4, and 5.

"Q. Third sentence, sir.

"A. I presume at that time it was.

[252] "Q. Did you believe it to be true at that time?

"A. Well, I would suspect so. It was back in 1964.

"Q. Would this be a letter that would require the approval of at least the executive committee to send forward?

"A. Well, matters of this kind, our general counsel usually take it up and we depend pretty well on our general counsel.

"Q. Would it be required that you approve that this will be forwarded, however, outside of Falstaff?

"A. I would say that we go along pretty well with our general counsel's recommendations.

"Q. Would the general counsel be allowed to send this out without submitting it first to the executive committee?

"A. I think it's a matter of good business practice. He usually presents these basically to the executive committee, but I again repeat, I don't think this letter ever was sent."

On Page 31 I will read questions 1, 2, 3, 4, 5, and 6.

"Q. Going on with it: 'To gain greater stability, it is essential that Falstaff expand its marketing territory and the logical direction [253] of such expansion is the north-

eastern section of the United States.' Would you believe that to be true at the time?

"A. Yes, I would think so.

"Q. Do you believe that to be true also in 1964?

"A. I would think so, yes.

"Q. What was it that made the logical direction of such expansion the northeast?

"A. Well, here's an opportunity of a pretty good market. It was in the trend of expansion of our objective of national distribution.

"Q. Was this the only logical direction in which Falstaff could have expanded at that time, geographical expansion, that is?

"A. Was this the only?

"Q. Yes.

"A. I think an opportunity was there which certainly would give us—again, the reaching of our objective of national distribution.

"Q. The opportunity to which you refer, sir, is a Ballantine acquisition?

"A. Well, not necessarily."

I am now reading on Page 32, questions 1 through 5.

"Q. This letter deals with the Ballantine acquisition, does it not?

[254] "A. Yes, sir.

"Q. What was the opportunity other than Ballantine that presented itself at this time, February 8, 1964?

"A. Well, if I recall, sir, we had discussed the Narragansett prior to that, and then had been discussing this one here, which did not materialize, as you know.

"Q. Do you recall when the Narrangansett discussions ceased?

"A. Well, again drawing from memory, I think we started that back in '61 and then re-activated it sometime in '64.

"Q. Sometime in '64?

"A. I think so. I'm quoting from memory.

"Q. This is Narragansett?

"A. Yes."

I will now read from the deposition of J. Howard Wemhoerner.

THE COURT: How do you spell that?

MR. SAGAT: W-e-m-h-o-e-r-n-e-r.

THE COURT: When was that taken, counsel?

MR. SAGAT: It was taken on May 1, 1967.

I will read from Page 2, questions 1 through 6.

THE COURT: Page 2, 1 through 6. Very well.

[255] MR. SAGAT: [Reading]

"Q. Will you state your full name, please, sir?

"A. John Howard Wemhoerner.

"Q. Will you state the name of your current employer?

"A. Falstaff Brewing Company.

"Q. And your current position with Falstaff?

"A. Vice-President, Finance.

"Q. And for how long a period of time have you been Vice-President of Finance?

"A. 1964, I believe it was.

"Q. And prior to 1964, were you with Falstaff?

"A. Oh, yes.

"Q. And what position did you have with them at that time?

"A. Comptroller and Treasurer."

On Page 3 I will read questions 1 through 6.

"Q. Do you recall the year when you became Comptroller?

"A. No, I don't.

"Q. Was it prior to 1960?

"A. I'd have to check on that. I don't recall the exact date.

"Q. In December, 1963, were you then the Comptroller?

"A. Yes.

[256] "Q. And could you give us a description of your duties as Comptroller?

"A. Well, the main thing was to control the finances, in charge of all finances of the corporation, and also through an assistant in charge of the accounting.

"Q. Was it a part of your duties as Comptroller to advise the Falstaff Corporation on any matters which would relate to raising financing for building or expanding its facilities?

"A. It would be in conference with other officers of the corporation.

"Q. And your participation in that conference would be in relation to the financial aspects?

"A. That's right."

On Page 6, question 5.

"Q. Was there any question at that time, December, 1963, that Falstaff would be able to raise the amount indicated of $35,500,000?

"A. I don't think there was any question."

I would like to offer as Exhibit 29 a memorandum dated 12/12/63, entitled "Meeting Re East Co."

THE COURT: "Meeting Re—"

MR. SAGAT: "—East Co." "Meeting Re East Co."

[257] THE COURT: E-a-s-t?

MR. SAGAT: Yes, your Honor.

THE COURT: Exhibit 29. It may be so marked.

[Copy of memorandum dated 12/12/63, entitled "Meeting Re East Co.," marked Government's Exhibit No. 29.]

MR. SAGAT: In reference to that document, in part I will read from the deposition of Joseph Griesedieck on Page 131, questions 1 through 8.

THE COURT: Is this the same deposition that we have been referring to earlier or is this another one?

MR. SAGAT: This is the same one.

THE COURT: That was taken in May?

MR. SAGAT: April 26, 1967.

THE COURT: April 26, 1967?

MR. SAGAT: Yes.

THE COURT: Questions numbers what, please?

MR. SAGAT: This will be questions 1 through 8 on Page 131.

"Q. I'd like to have this document headed with the date Thursday, 12-12-63, and noted 2:45 P.M., St. Louis Meeting re: east company marked Exhibit Number 11.

"Q. Mr. Griesedieck, I'm going to show you Exhibit 11. I have to apologize for the light color of it but I'm sure you can [258] sympathize with us. That is what we received.

"A. That is about what we received, too.

"Q. Do you recognize the handwriting on that document?

"A. Yes; I think that is Mr. Wehmueller's handwriting."

THE COURT: Is that the same individual to whose deposition you referred a moment ago?

MR. SAGAT: Your Honor, I think it is. I think that the name in this deposition is misspelled. I believe it should be W-e-m-h-o-e-r-n-e-r.

"Q. I direct your attention to the first page of those three pages and the list of names at the top of the document, Mr. Eberstadt, Robert Zeller—is that name Zeller familiar with you?

"A. I presume he was one of Mr. Eberstadt's staff; he didn't belong to us.

"Q. Would you—does the 'Jos' represent you?

"A. That's me, Joseph Griesedieck.

"Q. And Harvey B., Mr. Beffa?

"A. Yes.

"Q. John—

"A. Hayward.

[259] "Q. And Howard—

"A. Howard W. is Wemhoener, W-e-m-h-o-e-n-e-r."

THE COURT: Is what?

MR. SAGAT: Wemhoener. I believe it is misspelled here. This is correct.

THE COURT: In one place he is referred to as J. Howard; another place, Howard J.?

MR. GORING: In the spelling of the last name there is only one "r" in Wemhoener, the "r" on the tail end. It is spelled correctly in this deposition; incorrectly in the others. W-e-m-h-o-e-n-e-r.

MR. SAGAT: The answer on Page 132 then:

"A. Howard W. is Wemhoener, W-e-m-h-o-e-n-e-r."

Page 132; questions 1, 2, and 3.

"Q. Do you recall having a meeting on December 12, '63, in St. Louis with Mr. Eberstadt and Mr. Zeller?

"A. Yes. Approximately the time, I'm not sure of the date, but obviously that would be it, I'm sure here.

"Q. Do you recall if Mr. Beffa and Mr. Hayward and Mr. Wemhoener were also present?

"A. That's correct.

"Q. And do you recall suggesting a price of "$35,500,000 as a counter-offer to Mr. Eberstadt?

[260] "A. Frankly, I can't recall it but I'm sure if that's what is shown in the notes this is what we must have done."

I would like to refer the Court to Exhibit 29 which shows the figure $35,500,000 on the front page.

THE COURT: In other words, it is a half a million away. Is that it? You asked him $35,000,000.

MR. SAGAT: No, the question reads does he recall suggesting the $35,500,000; and the answer is, "Frankly, I can't recall it but I'm sure if that's what is shown in the notes this is what we must have done."

THE COURT: In other words, there is no discrepancy there.

MR. SAGAT: That is right.

I will now read Page 137, No. 4.

"Q. I ask you to examine Exhibit 12, Mr. Griesedieck. Do you see that letter attached?

"A. Yes."

Exhibit 12 refers to Plaintiff's Exhibit 28 in this case.

THE COURT: It is Government's Exhibit 28 in this trial?

MR. SAGAT: Yes.

THE COURT: Office memo.

MR. SAGAT: Pardon me?

[261] THE COURT: It is an office memorandum, Exhibit 28.

MR. SAGAT: Yes.

THE COURT: Dated February 18, 1964.

MR. SAGAT: Yes. I might point out attached to that memorandum is a letter—proposed letter.

THE COURT: To William H. Orrick.

MR. SAGAT: Page 137, question 4.

"Q. I ask you to examine Exhibit 12, Mr. Griesedieck. Do you see that letter attached?

"A. Yes.

"Q. A draft—I'm sorry—the draft of the letter attached.

"A. No, I don't think I did."

Page 138, question 8.

"Q. Was this discussed, this letter discussed before the Executive Committee?

"A. [Indicating Yes.] I'm certain it was; yes.

"Q. Were the contents of that letter approved before they were forwarded?

"A. Forwarded to whom?

"Q. Forwarded to Mister, to Messrs. Gallop, Climenko and Gould."

Answer on Page 139:

"A. Well, I presume they were; yes. Mr. McClellan apparently wrote this letter, a joint letter [262] with these gentlemen, and that was proposed to be sent, should we wish to proceed, and I viewed it at an Executive Committee meeting and Mr. McClellan recommended that this form be adopted and this was the way it was left. Generally speaking, when Mr. McClellan does such an artful job we don't usually change it."

On Page 139 I will read questions 1, 2, 3, 4.

"Q. Would such a letter as this need approval of the Executive Committee before it could be forwarded?

"A. I would have to ask our legal counsel that. I don't know whether under our by-laws—it probably, certainly was discussed and approved in principle; I'm sure of that.

"Q. As a business decision as opposed to the by-laws is what I meant.

"A. Right; certainly.

"Q. This is a letter that you would want to see before it left your shop?

"A. Certainly.

"Q. I'd like to direct your attention, sir, to Page three, paragraph with the subcaption 'Reasons for the proposed merger' and in particularly to the third sentence which relates [263] as such I quote, 'It is too heavily dependent upon a relatively small marketing territory and this makes it dangerously vulnerable to inroads of competition, particularly by the national brands.' End of quote. Is that statement a true statement; was that statement a true statement at the time?

"A. Yes; we believed it to be."

Page 140, questions 2, 3, 4, and 5.

"Q. And, again, in that paragraph, and I quote, 'To gain greater stability it is essential that Falstaff expand its marketing territory and the logical direction of such expansion is the northeastern section of the United States.' End of quote. Did you at that time believe that to be true?

"A. Yes. I think I've stated before that to become a national brand this was the logical area we had to eventually be in.

"Q. Is that still true today?

"A. That is—I still believe it to be true today.

"Q. I direct your attention now, sir, to page four of your Exhibit 12, the second to last paragraph on that page, and, in particular, the sentence which reads, and I quote, 'Yet, even here its [264] position is a precarious one constantly threatened by the inroads of strong competitors including the national brands.' Which national brands were referred to there?

"A. The four that I mentioned earlier, Anheuser-Busch, Schlitz, Pabst and Miller.

"Q. Was this true also at the end of 1964?

"A. We believed it to be, yes, some more dominantly than others, but all of them would be in that category."

Page 141, I will read questions 1, 2, 3, and 4.

"Q. But the overall competition itself within your marketing area was just as strong?

"A. As when?

"Q. As when you are referring to it here.

"A. Yes.

"Q. Would you say, if anything, stronger?

"A. Today, you mean?

"Q. At the end of '64 when this trend was going up in the national sales, national brewery sales.

"A. At the end of 1964 the trend was going down. Oh, the national brewers—I'm sorry—yes."

I will read from Page 144; questions 3, 4, and 5.

"Q. Again, on Page three, the statement that the—[265] 'It is essential that Falstaff expand its marketing territory and the logical direction of such expansion is the northeastern section of the United States—' Are you here referring to New England when you say northeastern?

"A. In this case I don't think so. I think northeastern here is with reference to New York, the general area from, say, New Jersey, northeast.

"Q. And why was this 'the logical direction'?

"A. Practically the only direction we weren't in.

"Q. Were you—were you not yet selling in the northwest, were you?

"A. Well, the northwest did not represent to us any real substantial market. We were also not in Wisconsin, Minnesota, oh, some parts of Montana, Utah, and places like that, but these were not markets that, quite frankly, had any real potential, or there were certain competitive conditions

that made it obvious that this is not too feasible, and I want to again repeat that even the northeast would have required the combination of facilities and distribution to make it possible. We had [266] no, as we said, expansion to that area; we do not necessarily mean from existing plants. In fact, I think that was our basic argument with Ballantine."

If the Court permits, I would now like to defer to Mr. Repetto.

THE COURT: Very well.

MR. REPETTO: Your Honor, most of the evidence that has been presented by the Government today has concerned the ability—the desire of Falstaff to enter the New England market. We have tried to show the advantages of a national brewer, the fact that Falstaff has been aware of those advantages, the fact that they have looked towards the East as the remaining frontier to enter this national brewer status.

I have several more documents to read from, which have already been entered as exhibits, to show that they had the confidence that they could pay for this expansion which they desired.

I would like to read from the deposition of J. Howard Wemhoener—it is spelled in the deposition W-e-m-h-o-e-r-n-e-r, but as it was pointed out by counsel, the first "r" is omitted. It is W-e-m-h-o-e-n-e-r.

I would like to read from Page 25, question 6, through all of Pages 26, 27, and 28.

[267] THE COURT: 26, 27, and 28?

MR. REPETTO: Yes, your Honor.

THE COURT: This deposition was taken on May 1, 1967?

MR. REPETTO: That is correct, your Honor.

THE COURT: Very well.

MR. REPETTO: [Reading]

"Q Are you familiar with the fact, sir, that in 1964 Falstaff was planning an expansion program over a ten-year period reported to cost approximately $35,000,000?

"A. Yes.

"Q. Were you engaged in the financial study as to the making of arrangement?

"A. This was a long-range plan and we had gotten up some schedule showing the effect of that long-range plan.

".Q Are those schedules to which you have just referred the ones, sir, that are marked in front of you now Plaintiff's Exhibit 44, that's the one which you have?

"A. Yes."

Your Honor, Exhibit 44 referred to in the deposition is a cash flow sheet with many figures on it which has not been introduced into evidence in this case.

"Q. Those are the long-range plans to which you [268] refer?

"A. That's right.

"Q. Was there any discussion within Falstaff in which you were involved in which you were asked whether or not Falstaff could finance such a program?

"A. Yes.

"Q. Did those discussions relate to the expansion of the Fort Wayne plant indicated as $20,000,000?

"A. Yes.

"Q. Was it your opinion at that time that Falstaff would be able to raise such an amount, if needed?

"A. If needed.

"Q. Was there any question at that time that Falstaff would be able to raise the money as shown on this long-range planning program?

"A. No, there was not.

"Q. Did you, in this regard, contact any interest outside Falstaff to inquire as to the availability of such money?

"A. No.

"Q. This was strictly an internal determination by yourself?

[269] "A. That's right.

"Q. In making such a determination, sir, what would you base your determination on?

"A. Principally on the cash flow.

"Q Cash flow is the one major ingredient you would rely upon?

"A. Yes.

"Q. And at this time I ask you to refer to Plaintiff's Exhibit 44, the initial sheet, I believe the initial sheet is marked, 'Cash Flow,' is it not?

"A. Yes, that's right.

"Q. Is that an accurate picture of the Falstaff's cash flow at this time, March of 1965?"

THE COURT: March of '65?

MR. REPETTO: Yes, your Honor.

"A. Well, 1965—1964 is actual and then you make assumptions from there on out.

"Q. From the cash flow is indicated by the '64 actual?

"A. Yes.

"Q. That is accurate?

"A. Yes.

"Q. As you see it now?

"A. Yes.

[270] ".Q Do you know who compiled the study, sir?

"A. Yes, Mr. Ferd Gutting.

"Q. Was Mr. Gutting reporting to you at that time?

"A. Right.

"Q. What other basic materials did you base your decision on at that time, 1964, that Falstaff could finance such a program, other than cash flow?

"A. Nothing that I know of."

From the same deposition I would like to read Page 29; questions 7, 8, and 9.

"Q. Was there any difficulty experienced by Falstaff in raising the amount of cash required to acquire Narragansett?

"A. No.

"Q. How much cash was actually required from New York Life Insurance by Falstaff?

"A. $12,000,000.

"Q. Do you know where the remainder of the purchase price for Narragansett came from?

"A. We also borrowed four and a half million dollars from banks, four banks."

Page 30, question 5, same deposition.

THE COURT: Page 30, you say? Page 30, question 5?

MR. REPETTO: Yes, your Honor. But I have decided [271] not to read that question.

THE COURT: You have decided not to read that question?

MR. REPETTO: I would like now to refer to Exhibit 17, Page 18.

THE COURT: That is the statement of the bright future?

MR. REPETTO: The title of the document is "Brewing's Bright Future."

THE COURT: "Brewing's Bright Future." Correct. Exhibit 17.

MR. REPETTO: Page 18, the last question on the page.

THE COURT: Go ahead. What is it you want to call my attention to? The last statement, what?

MR. REPETTO: The last question on Page 18. The document is in a question-and-answer format. The answer to that question is the first statement on Page 19.

THE COURT: You want to read it to me?

MR. REPETTO: Yes.

Question: 'You evidently make projections into the future, both as to sales and earnings. Based on previous increases in the past years, it would lead us to believe that expansions or acquisitions would be necessary that would call for capital expenditures or [272] possibly additional financing.'"

The question is to be answered by Mr. William J. Healy. And the front page of Exhibit 17 describes Mr. Healy as the comptroller and treasurer who joined Falstaff as a member of the accounting department in 1936 and by 1951 had become chief accountant for the company.

THE COURT: I don't quite follow you. You read a question on the bottom of Page 18.

MR. REPETTO: Yes, sir. The question was to be answered—

THE COURT: You said the answer appears on Page 19?

MR. REPETTO: I was about to read the answer when I realized you had not previously heard of Mr. Healy. So I am trying to identify Mr. Healy who is to answer this question in this document. Mr. Healy, at the time he answered this question, which was in 1964, was comptroller and treasurer of the corporation.

THE COURT: This question was answered in 1964?

MR. REPETTO: October 16, 1964.

THE COURT: In other words, the statement was issued at that time. Is that it?

MR. REPETTO: Yes, your Honor. I interrupted the answer because I realized you had not—Mr. Healy had not been identified in the courtroom.

THE COURT: It was answered by Healy?

[273] MR. REPETTO: This is Mr. Healy's reply. Perhaps I should read the question over again.

"Question: 'You evidently make projections into the fu-

ture, both as to sales and earnings. Based on previous increases in the past years, it would lead us to believe that expansions or acquisitions would be necessary that would call for capital expenditures or possibly additional financing.'"

Mr. Healy's answer to that question:

"'We feel that our sales volume should increase in the area of 3 to 5 percent a year, which would necessitate either expansion of present facilities or the building or acquisition of new facilities. We have already announced in our quarterly report that we are in the process of expanding our Plant Ten in St. Louis. This expansion, along with others in the future, could call for an expenditure of some $35,000,000 in the next ten years. We are hopeful that increased sales would be accompanied by more efficient operations which would lead to increased profits. Such profits, along with accelerated depreciation rates and the provision for deferred federal tax on income, should provide the funds to take care of a good share of this expansion program. However, it might be necessary to obtain additional [274] financing, and how we will secure these funds will be determined at the time that we need them.'"

That, your Honor, is to show even at the time they were contemplating a $19 million acquisition program in the East.

THE COURT: $19 million?

MR. REPETTO: That, your Honor, is what they paid for Narragansett.

THE COURT: Is there anything in that document about $19 million? You haven't answered my question.

MR. REPETTO: No, your Honor, the figure in that document was $35 million which had to do with expansion of existing plants.

I would now like to read from Exhibit 3(e). That is the 1963 Falstaff Annual Report. It is on Page 1, third paragraph.

"Late in the 1950's, after a quarter-century of dramatic growth characterized by short-term planning, your company embarked on a formal program of long-range development. Staff specialists teamed with experts from a management counseling firm to establish a formal plan for the

future. Now, as we move further into the 'soaring sixties,' the effects of this plan are being seen in virtually every function of the company."

[275] I now refer to Exhibit 3(f) which is the 1964 Annual Report. This, your Honor, was the last Annual Report prior to the acquisition of Narragansett.

I read from Page 1, Paragraph 1:

"Sales and earnings records were topped once again as Falstaff Brewing Corporation completed another successful business year in 1964. Gross sales for the year rose 5.7 per cent over 1963 to a new high of $211,943,253, and net earnings rose 12.2 per cent for an increase of $763,872. Within this framework of progress, your Board of Directors was able to increase the dividend from 70 cents per share to 76 cents a share, on an annual basis, in the fourth quarter of 1964."

Skipping two paragraphs, I continue:

"During the year our marketing forces increased penetration in existing markets and expanded into new sales areas. By year's end we were selling Falstaff beer in 32 states and 35 markets outside the United States. Aimed primarily at the dominant beer buyers '. . . men in the 21 to 40 age bracket . . . our hard-hitting 'Man-Size Pleasure' advertising campaign reached consumers via all major media, with emphasis on television.

"In anticipation of the demand of the [276] estimated 47 million consumers who will form our industry's prime market by 1967, your management is stepping up its long-range growth planning. First phase of a ten-year, 35 million dollar expansion program, was begun in the early Fall of 1964 at the largest of our two St. Louis plants. The annual capacity of this unit will be increased by about 500,000 barrels by the time we enter our peak season in early summer of 1965. New construction techniques, which make possible increases in capacity with lower capital outlay, will aim at countering the problems of excessive taxation and rising costs.

"Backed by expanded production, our marketing team has established goals calling for added sales of about a half-million barrels in 1965, or an increase approaching 8 per cent. While it is too early to anticipate an earnings

figure for the year, prospects appear to be good for continued gains."

I would now like to read from Exhibit 1; Paragraphs 14, 15, and 16.

THE COURT: Is that the stipulation?

MR. REPETTO: Yes, your Honor.

THE COURT: Exhibit 1.

MR. REPETTO: I am reading this into the record to show that Falstaff was the nearest of the top ten brewers [277] to the New England market.

THE COURT: This is a stipulation signed by counsel, isn't it?

MR. REPETTO: Yes, your Honor.

THE COURT: You want to read what, please?

MR. REPETTO: Paragraphs 14, 15 and 16.

MR. GORING: What is the date of that?

MR. REPETTO: The date of the stipulation?

THE CLERK: Filed 12/23/69.

MR. REPETTO: Paragraph 14:

"In 1964, only three of the top ten sellers of the beer in the nation were not selling in New England. They were the defendant, Theo. Hamm Brewing Co., and Adolph Coors Co."

Paragraph 15:

"The distance to Boston, Massachusetts, from St. Paul Minnesota where Theo. Hamm Brewing Co. in 1964 had a brewery is 1,385 miles."

Paragraph 16:

"The distance to Boston, Massachusetts from Golden, Colorado where Adolph Coors Co. in 1964 had its only brewery is approximately 2,000 miles."

Paragraph 17:

"The distance to Boston, Massachusetts from Ft. Wayne, Indiana where Falstaff in 1964 had a [278] brewery is 844 miles."

Paragraph 18:

"In 1964, the defendant, in terms of dollar sales, was the 375th largest of the Fortune Magazine listing of the 500 largest industrial corporations in the United States."

THE COURT: I didn't get that. You lowered your voice.
MR. REPETTO: I will read it over.

Paragraph 18:
"In 1964, the defendant, in terms of dollar sales, was the 375th largest of the Fortune Magazine listing of the 500 largest industrial corporations in the United States."

THE COURT: I think if this is a convenient place we will take a short recess.

[RECESS.]

MR. REPETTO: Excuse me, your Honor, I would like to read from Exhibit 1, which is the stipulation, some figures concerning sales of Narragansett in New England to prove that Narragansett was the largest seller of beer in New England.
Paragraph 3 of the stipulation reads as follows:

"The beer sales, in terms of 31 gallon barrels and market share percentages listed in [279] Exhibits O through Z attached hereto were as designated therein for each listed company in each listed state during each of the years shown."

I read from Exhibit O to the stipulation.
THE COURT: Exhibit O to the stipulation?
MR. REPETTO: —stipulation, which is Exhibit 1.
THE COURT: Exhibit O attached to 1.

MR. REPETTO: The heading is "Massachusetts Barrel Sales, 1964-1960." It lists each brand for each year; 1964, 1963, 1962, 1961, and 1960.

THE COURT: Barrel sales?
MR. REPETTO: These are in terms of thousands.

Narragansett, for the year 1964, 488 out of a total sale in Massachusetts of 2901.
1963, Narragansett: 460 out of a total sale of 2805.
1962, Narragansett: 418 out of a total sale of 2705.
1961, Narragansett: 393 out of a total sale of 2680.
1960, Narragansett: 318 out of a total sale of 2626.
I turn now to exhibit P of the same stipulation, which gives a percentage share figure for the figures that I just read. The heading of it is "Massachusetts, 1964-1960,

[280] Share of Market."

1964, Narragansett, 17 percent; 1963, Narragansett, 16 percent; 1962, Narragansett, 15 percent; 1961, Narragansett, 15 percent; 1960, Narragansett, 12 percent.

THE CLERK: What he has been reading from I don't have attached to Exhibit 1.

THE COURT: Did you hear that, gentlemen?

MR. REPETTO: Yes, your Honor, I have.

THE COURT: There must be several attachments.

MR. GORING: There are several attachments, your Honor.

MR. REPETTO: Your Honor, that was an error. The correct copy, which includes the exhibits, which was executed by both parties on 12/23/69, has just been given the Clerk. If that could be marked as the Exhibit 1.

THE COURT: It should be substituted for the stipulation that is now Exhibit 1.

MR. REPETTO: Substituted for the stipulation which had been previously given to the Court.

[Government's Exhibit No. 1, with complete attachments, substituted for previously marked Government's Exhibit No. 1.]

MR. GORING: That should consist of Exhibits A through Z.

THE CLERK: Correct.

[281] THE COURT: The stipulation now marked Exhibit 1 is the stipulation itself with exhibits annexed thereto marked A through Z. The copy previously marked, I take it, has been returned to counsel.

THE CLERK: Yes, your Honor.

MR. REPETTO: If I may continue reading, your Honor. from Exhibit P to Exhibit 1, reading the shares of the market held by Narragansett in the years 1964 through 1960 in the State of Massachusetts.

These are in percentage figures, your Honor.

THE COURT: You have given them all to me now, have you not?

MR. REPETTO: 1960, 12 percent?

THE COURT: Yes.

MR. REPETTO: I turn now to Exhibit Q of the same document: "Connecticut Barrel Sales, 1964-1960, (in terms of thousands)."

1964, Narragansett: 75; total barrels, 1389.
1963, Narragansett: 75; total barrels, 1337.
1962, Narragansett: 62; total barrels, 1281.
1961, Narragansett: 64; total barrels, 1284.
1960, Narragansett: 62; total barrels, 1278.

I read from Exhibit R of the same document headed "Connecticut, 1964-1960, Share of Market."

THE COURT: You say 1964 to 1960?
[282] MR. REPETTO: Through 1960.

1964, Narragansett, 5 percent; 1963, Narragansett, 6 percent; 1962, Narragansett, 5 percent; 1961, Narragansett, 5 percent; 1960, Narragansett, 5 percent.

I read from Exhibit S of the same document headed "Maine Barrel Sales, 1964-1960 (in terms of thousands)."
1964, Narragansett: 126, out of total barrels, 484.
1963, Narragansett: 124, out of total barrels, 469.
1962, Narragansett: 114, out of total barrels, 445.
1961, Narragansett: 117, out of total barrels, 461
1960, Narragansett: 90, out of total barrels, 467.

I read from Exhibit T of the same document headed "Maine, 1964–1960, Share of Market."
Narragansett, 1964, 26 percent; Narragansett, 1963, 26 percent; Narragansett, 1962, 26 percent; Narragansett, 1961, 25 percent; Narragansett, 1960, 19 percent.

I read from Exhibit U of the same document headed "Rhode Island Barrel Sales, 1964-1960 (in terms of thousands)."
1964, Narragansett: 379, out of total barrels, 587.
1963, Narragansett: 376, out of total barrels, 576.
1962, Narragansett: 372, out of total barrels, 560.
1961, Narragansett: 374, out of total barrels, 564.
1960, Narragansett: 372, out of total barrels, 561.

Reading from Exhibit V, and same document, headed [283] "Rhode Island, 1964-1960, Share of Market."
1964, Narragansett, 65 percent; 1963, Narragansett, 65 percent; 1962, Narragansett, 66 percent; 1961, Narragansett, 66 percent; 1960, Narragansett, 66 percent.

Reading from Exhibit W, same document, headed "New

Hampshire Barrel Sales, 1964-1960 (in terms of thousands)."

1964, Narragansett: 79, out of total barrels, 440.
1963, Narragansett: 77, out of total barrels, 411.
1962, Narragansett: 68, out of total barrels, 380.
1961, Narragansett: 58, out of total barrels, 372.
1960, Narragansett: 40, out of total barrels, 356.

Reading from Exhibit X, same document, headed "New Hampshire, 1964-1960, Share of Market."

Narragansett, 1964, 18 percent; 1963, Narragansett, 19 percent; 1962, Narragansett, 18 percent; 1961, Narragansett, 16 percent; 1960, Narragansett, 11 percent.

Reading from Exhibit Y, same document, headed "Vermont Barrel Sales, 1964-1960 (in terms of thousands)."

1964, Narragansett: 22, out of total barrels, 221.
1963, Narragansett: 21, out of total barrels, 210.
1962, Narragansett: 21 out of total barrels, 199.
1961, Narragansett: 21, out of total barrels, 189.
1960, Narragansett: 13, out of total barrels, 191.

Reading from Exhibit Z, same document, headed [284] "Vermont, 1964-1960, Share of Market."

1964, Narragansett, 10 percent; 1963, Narragansett, 10 percent; 1962, Narragansett, 11 percent; 1961, Narragansett, 11 percent; 1960, Narragansett, 7 percent.

The arithmetic, your Honor, on these figures will show that Narragansett for all of New England in the year 1960 sold 895,000 barrels of beer.

THE COURT: 1960?

MR. REPETTO: 1960.

THE COURT: In all New England.

MR. REPETTO: —sold 895,000 barrels of beer for 16.34 percent of the market.

THE COURT: That was when again?

MR. REPETTO: 1960.

MR. GORING: That figure was 895,000?

MR. REPETTO: 895,000.

MR. GORING: Thank you.

MR. REPETTO: In 1961 Narragansett sold 1,027,000 barrels of beer for 18.5 percent of the market.

In 1962 Narragansett sold 1,055,000 barrels for 18.94 percent of the market.

In 1963 Narragansett sold 1,133,000 barrels for 19.51 percent of the market.

In 1964, Narragansett sold 1,169,000 barrels for 19.41 percent of the market.

[285] The arithmetic on those figures showed that Narragansett with 19.41 percent of the market in 1964 was the leading seller in New England.

THE COURT: Is there a stipulation to that effect as well?

MR. REPETTO: The figures, your Honor, were derived from the stipulation. The arithmetic that I have just read has not been stipulated to.

THE COURT: It is a matter of compilation; that is all.

MR. REPETTO: Yes, your Honor.

In Exhibit 6 there is a supplemental interrogatory which I would like to refer the Court to, question 1 in the interrogatory.

THE COURT: Interrogatory No. 1. Is that it?

MR. REPETTO: Yes, your Honor.

"State Naragansett's total sales of beer, in terms of barrels and dollars, in each of the years 1960 through 1964 and for the first six months of 1965."

THE COURT: 1964 and the first six months of '65.

MR. REPETTO: I would merely like to point out the chart listed therein, in reponse to that question, shows increasing barrel sales for each year from 1960 through 1964 and increased dollar sales gross for each [286] year 1960 through 1964.

I would now like to read from Exhibit 2, which is the interrogatories. Interrogatory 11 reads:

> "State as to each of the following states—Rhode Island, Connecticut, Massachusetts, Vermont, New Hampshire, Maine, New Jersey, and New York—the number of distributors of Narragansett Brewing Company products in each such state as of January, 1965."

THE COURT: As of January, 1965.

MR. REPETTO: The answer to that interrogatory:

> "As of January, 1965, Narragansett Brewing Company had, in the States listed below, the number of distributors shown:
>
> "Rhode Island, 16; Connecticut, 9; Massachusetts,

15; Vermont, 6; New Hampshire, 6; Maine, 16; New Jersey, 8; New York, 18."

Your Honor, Mr. Cody will read in figures to show where the New England market is concentrated.

MR. CODY: Your Honor, according to Paragraph 3 of the stipulation in this action—

THE COURT: That is Exhibit 6 again?

MR. CODY: That is Exhibit 1, your Honor, I believe.

THE COURT: The stipulation, I thought—excuse me. Exhibit 1. I think you are right. Paragraph 3.

[287] Stipulated by the parties, is it?

MR. CODY: Correct, your Honor. And that would include also the exhibits there through—O through Z.

THE COURT: What?

MR. CODY: O through Z.

THE COURT: Exhibits O through Z very well.

MR. CODY: It would show concentration of beer sales in New England.

MR. GORING: I am very sorry. Is that 3?

MR. CODY: Paragraph 3, stipulation Exhibit No. 1. The top eight beer sellers in New England in 1960 accounted for over 70—

THE COURT: What did you say: the topic?

MR. CODY: The top eight.

THE COURT: This is a stipulation between the parties. Is that it?

MR. CODY: Yes, your Honor.

MR. GORING: I am having a little difficulty, Mr. Cody, finding it. Is this the stipulation dated December 23, 1969?

MR. CODY: Yes, it is.

MR. GORING: You are reading from Paragraph 3?

THE COURT: The top eight beer sellers in 1960. Is this something the parties have stipulated to, Mr. Cody?

MR. CODY: Yes, it is, your Honor.

[288] THE COURT: What does the stipulation recite?

MR. CODY: The stipulation is as follows—Paragraph 3:

"The beer sales in terms of 31-gallon barrels, and market share percentages listed in Exhibits O through Z attached hereto were as designated therein for each listed company in each listed state during each of the years shown."

Taking these figures, your Honor, and calculating from them—

THE COURT: This is a calculation you have made?

MR. CODY: Yes, your Honor.

MR. GORING: Is it possible for the Government to tell us they will furnish us a copy of this computation so that we may do our own mathematics?

THE COURT: I think it might be only fair. We don't want any mathematical errors here.

MR. GORING: Not immediately, but so that we can check them.

THE COURT: This is something you arrived at yourself, Mr. Cody?

MR. CODY: Yes, your Honor, correct; from the figures that were made available to us by documents which we received from Falstaff pursuant to a civil investigative [289] demand.

THE COURT: I would think counsel would be entitled to see your computations if there is any doubt about them.

MR. GORING: I just want at the end of the day perhaps to check them. I don't need to check them now. I can check them later on.

MR. CODY: It is simply a matter of arithmetic taken from documents given to us by the defendant.

I think the calculation shows that in 1960 the top eight in New England sold above 73.9 percent of all the beer sold in that area.

THE COURT: All the beer sold in New England, you mean?

MR. CODY: Yes, your Honor. In other words, the top eight sellers of beer in New England—not necessarily located in New England but sellers in New England—sold over 73.9 percent.

THE COURT: I don't know how you arrive at that. Perhaps Mr. Goring would know.

MR. GORING: Beg your pardon?

THE COURT: I don't know how you arrive at that conclusion of the top eight sellers. Well, originally we had—

MR. GORING: There are some hidden things in here which may distort that. But be assured if Mr. Cody makes [290] a mistake in what he tells you, I shall call it to your attention at the proper time.

THE COURT: If you are happy with that, I am. I will leave it to you.

MR. CODY: Very well. The top four leading sellers of beer sold in 1960 49.8 percent approximately of all the beer sold in New England. By 1964 the share of the top eight increased from over 73.9 percent to 77 percent.

THE COURT: Increased from what?

MR. CODY: By 1964 the share of the top eight increased from over 73.9 percent to 77 percent.

MR. MCLAUGHLIN: Is that the same eight brewers or does the top eight vary?

MR. CODY: I believe it is the same.

The share of the four leading sellers by 1964 had increased from approximately 49.8 percent in 1960 to 54 percent. During the same period we believe the stipulation will show that total sales in New England had increased by about 543,000 barrels of beer.

THE COURT: From 1960 to 1964.

MR. CODY: Correct, your Honor.

THE COURT: Increased by—

MR. CODY:—approximately 543,000 barrels of beer. During the same period the sales of the top eight brewers selling in New England had increased by 642,000 barrels, [291] more than absorbing the increase in sales. Naturally the shares of the smaller competitors diminished. As a matter of fact—

THE COURT: That would seem to follow.

MR. CODY: Excuse me?

THE COURT: That would seem to follow.

MR. CODY: As a matter of fact, the sales of the top four sellers during this period alone absorbed approximately 528,000 barrels of the 543,000-barrel increase.

In the same stipulation, your Honor, which is Government's Exhibit 1, I would like to read Paragraphs 11, 12, and 13 into the record so that they may be viewed against the concentration which we have pointed out in the New England market.

Paragraph 11 reads:

"Since 1935, the number of brewing companies and breweries has declined. As of July 1, 1935, 663 brewers operated 684 breweries. In 1952, 370 brewers operated 334 breweries. . . ."

MR. GORING: What was that number; how many breweries?

MR. CODY: [Continuing]

"...307 breweries operated 334..."

MR. GORING: You originally said "370." That is why—

[292] MR. CODY: Excuse me.

"As of July 1, 1957, ..."

THE COURT: '57?

MR. CODY: Yes, your Honor.

"...229 breweries operated 255 breweries. As of July 1, 1964, 144 brewers operated 190 breweries. As of July 1, 1965, 140 brewers operated 178 breweries."

We can see a steady decline.

MR. GORING: That is not part of the stipulation.

MR. CODY: No, it is not. That is a comment.

Paragraph 12 in the stipulation reads as follows:

"Since 1935, the number of brewing companies operating breweries in New England has also declined. As of July 1, 1935, there were 32 brewers operating breweries in New England. In 1957, there were 11 brewers operating breweries in New England. In 1964, there were six brewers operating breweries in New England."

THE COURT: 1957?

MR. CODY: Yes, your Honor.

THE COURT: There were 11 companies operating breweries?

MR. CODY: Yes, your Honor.

"In 1964, there were six brewers operating breweries in New England."

[293] That is the end of Paragraph 12.

All this, your honor, we would point out, has taken place during the period when per capita consumption of beer has been on the rise. And that leads us to Paragraph 13 of the stipulation which reads as follows:

"Per capita beer consumption in the United States increased from 10.3 gallons in 1935 to 15.6 gallons in 1964."

THE COURT: What is that again?

MR. CODY: ". . .10.3 gallons in 1935 to 15.6 gallons in 1964."

Excuse me a second, your Honor.

THE COURT: What is that?

MR. CODY: May I have a second?

THE COURT: Certainly.

[A pause.]

MR. CODY: It is this concentration, your Honor, which, as we attempted to point out in our pretrial brief, makes potential competition.

THE COURT: Concentration?

MR. CODY: Yes.

THE COURT: Meaning what?

MR. CODY: The concentration of sales within a small number of firms in New England. This is what makes the potential competition, as we pointed out in our brief, which [294] is involved in this case, so very, very important to this market.

THE COURT: You mean the sales are shared by a few brewers.

MR. CODY: That is correct, your Honor. In such a situation the potential entry of a fresh competitive factor is of extreme importance.

It has come to my attention that we have inadvertently left out one piece of information which doesn't exactly bear on concentration, but we would like to put it in the record at this point.

THE COURT: Very well.

MR. CODY: That is M to stipulation which is Government's Exhibit No. 1.

THE COURT: You mean that has been left out, too? I thought we had them all a moment ago.

MR. CODY: We just wanted to read this part of it in.

THE COURT: It is now part of the exhibit with the Clerk.

MR. CODY: Very well. We simply wanted to point it out to the Court.

THE COURT: That is all right if you wish to point it out. M attached to Exhibit 1?

MR. CODY: Correct. —shows Falstaff to be the fourth largest seller of beer in the United States in 1964.

[295] THE COURT: That has been stipulated by the parties.

MR. GORING: The schedule attached to the stipulation.

MR. CODY: Also, in Government's Exhibit 1, Paragraph 14, it is stipulated that:

"In 1964, only three of the top ten sellers of beer in the nation were not selling in New England. They were the defendant, Theo. Hamm Brewing Co. and Adolph Coors Co."

THE COURT: Who, the defendant?
MR. CODY: The defendant.
THE COURT: Falstaff. Yes. What is the other?
MR. CODY: Theodore Hamm Brewing Co.
THE COURT: H-a-m?
MR. CODY: H-a-m-m. And Adolph Coors Co.
THE COURT: Adolph—
MR. CODY: —C-o-o-r-s.

We have already placed in evidence the distance between the breweries operated by the latter two corporations and Falstaff, and we simply wish to point out to the Court at this time now that Theo. Hamm in 1964 was the eighth largest brewer in the nation, and Coors was the ninth largest.

I was wondering at this time, your Honor, if we could have perhaps five minutes or so to check through our records and make sure that we have introduced all the [296] proof that we intend to introduce.

THE COURT: You can, or we will stop here until tomorrow morning if you would appreciate a little more time to verify that. Suppose you do that and you won't have any misgivings.

MR. CODY: Thank you.

THE Court: We will stop here until 10 o'clock tomorrow morning.

[Adjourned at 4:20 p.m. until Thursday, October 8, 1970 at 10:00 a.m.]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA,
*v.*
FALSTAFF BREWING CORPORATION
} C. A. 3523

Before his Honor, Chief Judge Day

Thursday, October 8, 1970

APPEARANCES:

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Antitrust Division

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[299] MR. REPETTO: Good morning again, your Honor.

At this time I would like to correct Exhibit 2 which was introduced on the first day of trial, which was introduced without an attachment called "Supplemental Answers of Defendant Falstaff Brewing Company to Interrogatories of the Plaintiff." Exhibit 2 is the interrogatory—

THE COURT: That is No. 10, is it?

MR. REPETTO: It is Exhibit 2, your Honor.

THE COURT: What is the document itself?

MR. REPETTO: The document is "Interrogatories to be Answered by the Defendant Falstaff."

THE CLERK: "Interrogatories and Answers Thereto."

(Bench conference between the Court and the Clerk)

THE COURT: What is it you wish to add to 2?

MR. REPETTO: Exhibit 2, as introduced, had the interrogatories and the answers to the interrogatories. Missing from that was Appendix or Supplemental Answers of defendant to the interrogatories covering questions 9, 10,—just questions 9 and 10—supplemental answers to the interrogatories.

THE COURT: It may be included as a part—

MR. REPETTO: I substitute the complete interrogatories, answers thereto, and supplemental answers thereto.

THE COURT: For Exhibit 2 as it now stands; a new Exhibit 2.

(Original Government's Exhibit No. 2 withdrawn; complete Exhibit No. 2 substituted)

[300] THE CLERK: I will return the old exhibit to counsel.

MR. REPETTO: Your Honor, I would like to introduce as Exhibit 30 a stipulation between the parties as to percentage sales in the New England market of the eight largest sellers.

THE COURT: At what time?

MR. REPETTO: If I may read that, your Honor.

THE COURT: Any particular period?

MR. REPETTO: In the year 1964.

THE COURT: It may be so marked, Exhibit 30.

(Stipulation re percentage sales in New England market of eight largest sellers, 1964, marked Government's Exhibit No. 30)

MR. REPETTO: The exhibit reads as follows:

"Stipulation. Parties to the above-entitled civil action stipulate and agree, solely for the purposes of the within action, that in 1964 the eight largest sellers of beer in the six-state New England area accounted for 81.2% of total sales of beer in that area."

THE COURT: Accounted for 81%?

MR. REPETTO: 81.2% of total sales of beer in that area.

MR. GORING: That stipulation is entered into without any concession of relevance.

MR. REPETTO: This information, your Honor, is based on more recent information than what was read to the Court yesterday.

[301] MR. CODY: Your Honor, at this point the Government rests its affirmative case subject to—

THE COURT: Rests what?

MR. CODY: Subject to our right—

THE COURT: You said something: "rests its case."

MR. CODY: Its affirmative case. —subject to our right to offer rebuttal evidence.

MR. GORING: If the Court please, before it is appropriate to permit the Government to rest, the defendant proposes to introduce into the record certain portions of depositions which have not been introduced by the Government.

THE COURT: You are doing that as part of your case, I take it?

MR. GORING: I think not, your Honor. I think we are acting under Rule 32(a)(4).

THE COURT: What does it provide?

MR. GORING: It provides that

"If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, * * *."

THE COURT: Is it important, Mr. Goring, that they be introduced? The Government has rested. It seems to me when the deposition was being read was the time to interject that some other part of it should be offered as part of the Government's [302] case.

MR. GORING: The difficulty with that is that the Government never stopped reading depositions. They returned to the reading time and time and time again.

THE COURT: I appreciate that. There were frequent references to the same deposition. It strikes me, the Government having rested, if you want to introduce them as part of your case, there is certainly no valid objection.

MR. GORING: If a motion to dismiss is made under Rule 41, your Honor ought to have before you all of the evidence, including that which is suggested in the rule I have just read, because at that point your Honor has the right to weigh the evidence in deciding the motion to dismiss.

THE COURT: I tell you, frankly, Mr. Goring, I don't think, in view of the volume of material that has been presented here, I would be disposed to pass upon the motion to dismiss until I heard the defendant's case.

MR. GORING: I propose to make such a motion.

THE COURT: You may make it. The Government has rested. Now is the time. You may make it, if you wish.

MR. GORING: If the Court please, I now move to dismiss the plaintiff's case under Rule 41.

THE COURT: Under Rule 21?

MR. GORING: 41.

THE COURT: I misunderstood you.

[303] MR. GORING: The ground for that motion is very simple and I can make it brief.

The Act under which this suit is brought, Section 7 of the Clayton Act, forbids the acquisition by a corporation engaged in interstate commerce of the stock or assets of another corporation engaged in interstate commerce only under these circumstances: where in any line of commerce in any section of the country the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly.

There is not a scrap of evidence in this case about the effect of this acquisition upon competition. All through the introduction of the Government's case in a fashion somewhat unusual to me you were told from time to time what the evidence offered by the Government at that particular moment was to prove. At no time were you told that any piece of evidence had anything to do with the anti-competitive effect of the acquisition. That is a crucial piece of the Government's case. It is an important section of the burden which they bear, and it has not been met nor has any attempt been made to meet it.

You are being asked at this juncture of the case to de-

clare that this merger inevitably substantially lessened competition without anything in the record upon which your Honor could make such a finding.

MR. CODY: May I be heard on that, your Honor?

[304] THE COURT: Certainly. That is why we are here.

MR. CODY: In our opening statement we attempted to show that the Government would prove—and I believe we have—that Falstaff, the fourth largest brewing corporation in the nation, had a continuous intensive interest in entering New England; that it carried on negotiations for five years with companies serving New England; that alternative methods of entry other than the acquisition of the largest New England brewer were available to Falstaff; and that it was in fact one of a few and the most likely entrant into this market; that its entrance into this market was especially important because the market is concentrated; that is, the sales of beer in New England are highly concentrated in the hands of a relatively few number of brewers.

The entry by Falstaff by building a brewery, by shipping into this market, and opening it up, by the acquisition of a company less than number 1, thereby eliminating its most significant potential competitor, were all available to it. Because of the concentration in the market and because of Falstaff's being the most potential entry, the acquisition by Falstaff of the leading firm in this market eliminated what we consider to be one of a few potential competitive effects that this market could expect for years.

If it is Mr. Goring's contention that this was not stated [305] in one sentence, that I will admit. We can't do that. We must show all the facts, including concentration, intention, ability, and so on. However, I believe my present statement and our opening statement cogently piece together what the theory of this case is. And simply because we did not show in one sentence an anti-competitive effect, I believe Mr. Goring's motion should be denied.

THE COURT: In passing upon a motion such as this it seems to the Court that it is its duty to view whatever evidence has been presented here and the reasonable inferences to be drawn from it in the light most favorable to the Government.

Having that criterion in mind, it seems to me that it would be improper for this Court, until it has heard the de-

fendant's defense, if any, to grant such a motion. The motion to dismiss is denied. The defendant's objection to the Court's ruling is noted.

MR. GORING: May it please the Court, I shall make this opening as brief as I can, and by that I mean it will be brief. We shall proceed as expeditiously as we can with the defendant's case and I hope that that will be brief. I rather think we should be able to complete the defendant's case much sooner than I had anticipated, although I have run into one snag with one witness. And I may, when the rest of the proof is in, have to ask your indulgence until Mr. Haffenreffer returns [306] to town.

THE COURT: There will be no difficulty in that regard. I appreciate the dispatch with which the Government has presented its case and I know you are hopeful of doing the same thing. Don't let that concern you.

MR. GORING: He is at the moment in Vermont, and we will try by telephone to persuade him to come back for half to three-quarters of an hour of testimony.

MR. CODY: I am having trouble hearing you, Mr. Goring. [307] THE COURT: The acoustics are not too good in this courtroom. I appreciate the problem.

MR. GORING: Now, at this stage of the case the issues are more blurred than they were before testimony began. And without intending to be too invigorate, I suggest that it suits the Government's purpose to have this kind of case at this posture and at this time, but I think I must clarify the issues to a degree.

The Government does not pretend that Falstaff and Narragansett were competitors. In fact, in their trial brief they expressly disclaim any such position.

THE COURT: They were competitors, you say?

MR. GORING: They were not competitors, and I say that the Government does not pretend that they were and expressly disclaims any such pretense in their trial briefs. Indeed, when counsel at one point suggested they were in competition, I rose to correct him and he withdrew what he said. Falstaff and Narragansett have never sold beer head to head anywhere in the country. Before the acquisition of Narragansett by Falstaff for all practical purposes Falstaff was never closer to New England on the west side than Ohio.

THE COURT: I didn't get that.

MR. GORING: I say for all practical purposes Falstaff was never closer to Rhode Island than Ohio on the western side and [308] never closer to New England on the southern side than the Washington, D. C. and Virginia areas, and those places are a long way off.

Counsel suggested in his opening that Falstaff had, and he said he would show it had, a gnawing desire to enter New England. There is not the slightest scrap of evidence of a gnawing desire to enter New England, and the defendant's proof will show they had no such desire. It is perfectly true it has never been denied and the same has been said publicly over a period of years by Falstaff people, that they did have a desire to get into the national brewers states, and that meant translated in terms of the evidence the Government has offered, evidence which was unnecessary because we were always prepared to concede it, and it is evidence which has taken half the time of the Government's case.

It is true that they did desire to become a national brewer, and to accomplish this they had clearly in mind the necessity for them to penetrate the markets of the northeast section of the country. The northeast section of the country does not mean New England. It includes New York, New Jersey, Philadelphia and some other areas lying west of New England.

Your Honor will recall the interest which Falstaff had in negotiating with Liebmann Brothers to acquire this company. Now, Liebmann Brothers does not sell beer in New England. Had Falstaff been able to acquire Liebmann it would have given them [309] entry to the New York metropolitan area, not to New England at all. And had they acquired Liebmann they would have been incapable in any long-range forseeable future of entering New England in any fashion. So to suggest to your Honor by way of rhetoric and atmosphere that Falstaff had a gnawing desire to enter New England is a false suggestion, and the underlying facts which support what I have just said will be offered in evidence on behalf of the defendant.

Now, we propose to show you several things which bear directly on this matter. The statute, as I said a few minutes ago in another connection, forbids the acquisition by one corporation of the assets or stock of another where the effect may be to substantiate lessened competition. Now,

the Government will tell you, and they will tell you as soon as I start offering certain evidence which I shall do in a few moments, they will tell you that the only way to determine the lessening of competition aspect of this case is to go back to 1965 and look into a crystal ball and a clouded crystal ball at that.

They will tell you that as a judge you must go back to the pre-acquisition period and forget about the anticompetitive effect which this acquisition might have, and they will tell you you have no license to admit or entertain evidence of what has in fact happened in the marketplace in the five years in which this case has lain dormant.

[310] Parenthetically, I call your Honor's attention to the fact that the evidence the Government has offered between opening and resting their case was in their hands as early as mid-1967. Muchas they had before the case was brought, and you were told that by them in July of 1965 at which time was denied an application to prevent this merger. At that time they had and had had since late March of 1965 all the information from Falstaff and Naragansett which they asked for and upon which they predicated their Complaint.

The depositions, portions of which have been read into evidence, were taken in April and May of 1967, so that by midyear of 1967 the Government had in its files every scrap of information which they have given you concerning the situation before the acquisition. And it has taken them from that time to now to bring this case which they think and act is a critical matter in the economic and competitive field.

It has taken from then until now to bring this case to trial, and they will tell you that you have no right to look at the realities of the marketplace and observe what in fact has happened as far as competition is concerned. But I shall offer evidence of that, and that evidence will show you that in the five-year period from 1965 to now, far from improving the economic position and the market position and the sales and the profits of either Falstaff or Narragansett or the two companies [311] together, far from improving, their competitive posture has been weakened. Their market shares have gone down. Their barrel sales of beer have gone down. Falstaff has not been able to sell more than in insignificant quantity of beer in the New Eng-

land States. It has not yet gained acceptance; and Narragansett's position has worsened and worsened substantially.

One of the first pieces of evidence we shall offer you is contained in half-a-dozen sheets of paper which form a part of a submission made to the Government in 1968 and again in 1969 in an effort to have them realize that far from lessening competition, far from gaining a competitive advantage, this corporation and each of its components have lost by this acquisition. And in point of fact, to grant the relief the Government prays, that is to say, vesting of Falstaff by Narragansett would have disastrous consequences to Falstaff and Narragansett alike, but you will be shown those things.

Now, I have said the two parties were not in competition with one another prior to the acquisition, and I told you the Government concedes this and made no attempt to disprove it. So we are left so far as the anticompetitive effect of this acquisition with which we are concerned, we are left with a fanciful theory which has no real identifiable dimension the way the Government deals with it. We are left to the theory that substantial lessening of potential competition is forbidden [312] by the Clayton Act.

Now, you are told obliquely by the Government in the manner in which it has presented its case and in the case which is now on this record on behalf of the Government, you are told that Falstaff had a number of alternatives as far as penetrating the New England market is concerned, if that was their aim, and indeed it was one of several aims they had. As I have said, they wanted to get into the northeast, but New England the northeast are not the same thing. New England is only part of the northeast.

Those alternatives, they say, include these: they could have built a brewery in New England and therefore acquired the capacity to serve the hungry or thirsty beer drinkers. You are told they could have transported beer from breweries 800 and somewhat more miles away. You are not told that either of those things are economically feasible.

There is not a scrap of evidence in the record from which the inference could be drawn that Falstaff could have brewed beer in its existing brewery, shipped it in here and sold on an economically feasible basis. You are not

told that it could have built a brewery in New England and sold to capacity or anything like capacity of that brewery to the New England beer-drinking consumers. And you will be told this, and it was part of the Government's burden to tell you this and to prove [313] this, and they have not done it. You will be told that two things are necessary in order to enter a market of this kind; one is the ability to produce the product in quantities which are economically sensible and which will produce on a realistic, intelligent, businesslike projection blank-ink figures on a profit and loss statement and not red-ink figures.

So, the quantity of product, the ability to produce quantity of product necessary to run a successful business of this sort is one aspect of it, but you will also be told the even more critical factor is the ability to sell the product. It does not good to brew beer in half-million-barrel lots annually if you cannot sell it, and you will be shown that beer could not be sold in the New England market by a newcomer without an existing viable, aggressive distributor organization. And you will be told that that sort of organization cannot be created, could not be created in this market without a terrific, inordinate, a foolish expenditure of money.

The only way Falstaff could enter the New England market was to acquire in some fashion, not build, a brewing facility to produce the product, but to acquire also a viable distributor organization, demonstrably viable by experience, to sell the product once produced. And you will be told with no such thing in sight, drawing boards, imagined or otherwise, except an acquisition.

[314] Now, the Government has a theory which is, so far as the judicial determinations on the point are concerned, comparatively new. You were handed the other day a portion of the record in FTC against Bendix-Fram Corporation, and you were handed at the same time a typed or otherwise reproduced copy of the opinion of Commissioner Elman of the FTC in that case.

That opinion is not yet officially reported. The case is on its way to an appeal in, I think, the Court of Appeals for the District of Columbia. The Commissioner announced a theory upon which the Government relies and which they say lies within the ambit of this vague, undefined creature, potential competition. What that decision, on appeal as I

say, what that decision announces is the doctrine which is called the toe-hold doctrine, and it goes like this:

If a producer of Product A is standing in the wings, as the Commissioner says, outside the market, merely standing there, but in a position to move into the market if he chooses. He must remain there in the wings and forebear acquiring the producer of a like product within the market area.

The Commissioner fancies that the mere presence of such a manufacturer or seller close to the market area had some effect which could fall within his ill-defined concept of potential competition. And he found in Bendix-Fram that Bendix was in such a position. He found that Bendix could have acquired [315] a small company rather than Fram, a relatively larger one, beefed it up by expenditures of money which Bendix could afford, and develop it into a full-blown competitor within the market area. I do not know whether that notion will gain substantial acceptance in the theory of antitrust law. I do not know that it will have the approval of the Supreme Court if and when it ever reaches it. I do know, however, that that is an entirely different situation that we have here.

In the first place, when you talk about standing in the wings, which is the record to be found in the Commissioner's opinion, you must remember what I have said about the location of Falstaff's market with respect to the New England market. You must bear in mind that they were not within five miles of the geographical bounds of New England in any direction.

THE COURT: Was Bendix within five miles of New England?

MR. GORING: Bendix was everywhere as far as the filter market was concerned, everywhere in the country.

THE COURT: Where was its plant?

MR. GORING: I will have to review that opinion in more detail before I can answer that. To answer that question, at the close of the case I will be prepared to answer it.

[316] MR. GORING: (Continuing) If there is any sense to this total theory at all it must be that the acquiring company was in fact so closely located to the market served by the acquired company that its entrance into the market unilaterally, under its own steam, without motivation was a distinct threat to those who were competing in the market.

As I told you, Falstaff was never closer to New England in any significant length on the west end than the state of Ohio and never closer to New England on the south side of any significant length than Washington, D.C. and Virginia. It is hard to suppose that in those locations Falstaff was a competitive threat or likely entrant or anything of that kind to any brewer selling its product in the New England area, and there will be evidence offered to show you that. I have said to you, I said to you a few moments ago in another context that there is no evidence here of what the competitive effect on the competition from this merger has produced. And I am correct, and I repeat, that the record is barren on this point. I am correct when I charge at that time the Government made no attempt to remove that barren aspect of this critical issue. We shall produce evidence of a man learned in this economic area, and learned in special significance in the brewing industry, its development and its economic facets, who will give you his opinion that there was no lessening of competition occasioned by this acquisition substantial or insubstantial. As I said a few moments [317] ago the reality of the matter, the thing that should happen in the five years between the bringing of this suit and today afford you a far more intelligent yardstick so far as what happened to competition, a far more intelligent yardstick of what would happen post 1965 looking at what did happen then to go back, project yourself five years back and look in a mirky crystal ball and make a guess uninstructed about what did in fact happen. You must close your mind to that the Government says. Make a guess as to what the probability was as far as the anti-competitive effect if this acquisition is concerned. Now, that approach to the critical issue of the effect upon competition, going back and looking forward and guessing rather than looking at the record of the last five years, that was not the approach which led the Supreme Court in the United States, speaking through Mr. Justice Black to strike down the acquisition by Croft of another brewery. The economic facts which Mr. Justice Black reviewed and in which he said demonstrated that there had been a substantial lessening of competition, the economic facts upon which he relied and which formed the central core of his opinion as far as the economic consequences are concerned were enlarging in substantial dimension of the market

shares on the part of the acquiring company in the years between the acquisition and the time of trial. Now one more word on the subject of potential competition. The leading case, one of the leading cases, not too far removed from [318] us in point of time upon this subject of potential competition, I venture it to be, I believe, the land mark case or one of the land mark cases on the subject, is United States v. Penn-Olin. There two producers of chemicals, one Pensault Company and the other Olin-Mathewson, got together in a joint venture and entered a market in the south-eastern part of the United States for the manufacturing of a particular type of chemical for which there was in that area a market. The Government attacked that joint venture upon the grounds that either Pensault Corporation of Olin-Mathewson, or both, would have entered that market on their own, and the combination by the joint venture route removed the possibility that either or both would enter that market unilaterally and compete with other producers there and with each other. The case went to the Supreme Court after a finding adverse to the Government by the District Court and it went to the Supreme Court by way of the expiditing act and not through the Court of Appeals. The Supreme Court sent it back. There is a discussion of this case in an appropriate fashion, I believe, in the defendant's pre-trial brief, but I think it is useful to mention it now. Now the case, I think, was dismissed by the court below on the grounds that the Government had not proved its case, had not sustained its burden. The Supreme Court remanded and told the District Judge in its mandate to examine into the probability that either or both of the companies [319] would have unilaterally entered into the market and competed standing alone. The District Judge heard the case on remand and he found there was no probability that either of these companies or both would have entered that market in any other fashion than the way they did, and his findings, and they have not been disturbed, his findings on remand and judgment on the remand were sustained byan equally divided court. His findings have not been disturbed and they are important here. It is not the mere possibility that acquisition will have the proscribed competitive effect, it is not the mere possibility that that will occur which is sufficient to bring the acquisition within the proscription of the Clayton Act. It must be found to be

a probable result, not a possible, not an imaginary result. The District Judge there on remand found it was not probable. The Government asked him to give this question the crystal ball treatment and he declined to doit. The thrust of his opinion, so far as I am interested with it at this moment, the thrust of his opinion was two-fold. One, was that the effect, proscribed effect must be probable, the other was it was the burden of the Government to prove it probable and he was asked to disregard what the company officials told him in their testimony with their determinations as managers of the company so far as entering this market unilaterally. Hewas told by company officials in testimony that they would not have entertained the notion of entering, penetrating that market and [320] competing with others unilaterally or in any other fashion than the way they did. He said, "That's good enough for me." "I don't have to guess what they would have done. They have told me what they would have done, what they would do, and would not do. So long as I hold or find them credible that evidence weighs most heavy with me." The Government would tell you at the earliest opportunity it has that that is not a proper rule of law. They will tell you you must disregard it, disregard what company officials tell you they would have done back in 1965 so far as penetrating the New England market in any other fashion than by acquisition. You will be told they would not have done it and you will be told why, and I say you will be told by the Government that that ought to have no weight. The fact is, and you will be told this, the fact is that prior to 1965 Falstaff had attempted to penetrate the Detroit market. Detroit had the facilities to provide capacity production. They had no distribution or organization. They acquired none. None was in existence. They sort todevelop one and failed and lost a great deal of money in that experiment. The same thing occurred when they attempted to penetrate the Chicago market in the same fashion. They fell on their face again. Almost the same thing occurred when having a brewery in the northern area of California and being able to reach and engage an existing distributor that they knew to be viable and as a result of which they moved into southern [321] California and fell on their faces again. You willbe told by the officials of this company, in fact, some of them have said this in portions of the depositions which have not

been introduced, you will be told that having had that bitter experience they thought they had learned a critical lesson so far as penetrating new markets were concerned, particularly markets where competition was a dog eat dog proposition which is true in New England. They though they had learned the lesson. They could not afford to try and penetrate any market in this fashion and try to enter the New York market which would have been a valuable market to establish themselves in. They were interested in acquiring Liebman, not building breweries or shipping beer in, and when the opportunity to acquire Narragansett came along they thought theysaw both essential factors, 1/ Producing necessary quantities of products and 2/ organization which could effectively seel it and they were moved to make this acquisition in that fashion. Now, let me come back to the opening of counsel for the Government and call your attention again to the record designed to produce an atmosphere unfavorable to the defendants, an atmosphere without much form, without much substance. Falstaff had an annoying desire to enter New England. Falstaff did not seek out Narragansett at any time. They were approached in 1961 by a middle man and entertained the thought of acquisition discussed it, but it did not jell and it was dropped as far as that was concerned at that time. I presume for—

[322] THE COURT: When was that again?

MR. GORING: 1961, Your Honor. Negotiations between Narragansett and discussions between Narragansett and Falstaff with respect to Falstaff acquiring Narragansett occurred in the period in which 1961 is situated, but by 1962, if I recall the matter correctly, by 1962 nothing had occurred and the notion was abandoned. They did not seek out Narragansett again, nor did they seek out any New England brewery. A middle man, again, introduced the subject in 1964, discussing Narragansett and the acquisition that followed. At no time, so far as the record shows, at no time, so far as I know, did Falstaff initiate any negotiations with anyone selling in the New England area with respect to acquisition, and that picture does not support these notions that they had a gnawing desire to enter New England, which would inevitably get them in there unilaterally within the foreseeable future period of time. Now, Section 7 of the Clayton Act cannot mean in the language where the effective such acquisitions may be to substan-

tially lessen competition, it cannot be that that effect runs into the hurdle of this act. It's a likelihood of the acquisition occurring or the entry occurring 50 years hence.

[323] Probable consequences of competition cannot be imagined over a long span of years into the future. It is only if the entry into the market in some other fashion than by acquisition is probable within the foreseeable future that you can suggest Section 7 of the Clayton Act is in any way involved. And there is no showing by the Government on this record of any of these significant things.

The burden is upon them to prove the various factors which support their view that this acquisition runs afoul of the Act. It is really not our burden to prove that it is not so. And they have dismally failed to meet the burden, the affirmative burden, that is upon the plaintiff in these cases. And as your Honor would like us to do, we willingly now assume the burden of proving they are wrong even in their thinking.

MR. MCLAUGHLIN: May it please the Court, at this point we would like to read into the record portions of certain depositions. Some of these depositions have been used by the Government and certain portions have been read into evidence. And we would like to read other portions of those depositions at this time.

First, I would like to read from the deposition of Ferd J. Gutting, taken on the first day of May 1967 in St. Louis, Missouri. From that deposition on page 9, toward the bottom [324] of the page:

"Q. Was there any discussion within Falstaff at which you were involved relating to the entry of Falstaff into the New England markets by any means other than acquisition?

"A. No.

"Q. Did you ever see a report or study as to the cost figures of shipping Falstaff beer into New England"

Going to the page—at the top of page 10:

"A. Not to my knowledge.

"Q. To your knowledge, was such a report ever requested by the management people of Falstaff?

"A. No.

"Q. If such a study had been requested, would you, sir, be the one who would make such a request?

"A. Probably I would have."

Skipping now to page 43 of the same deposition:

"Q. Was it ever expressed to you by any of the other management personnel at Falstaff that if Narragansett were not acquired, Falstaff would sit back and wait for another opportunity to acquire another brewery?

[325] "A. I think Falstaff had no other alternative.

"Q. Yes, but would you read the question, please?

(Whereupon, the previous question was read by the reporter.)

THE WITNESS: I don't recall any such specific statement."

That concludes Mr. Gutting's deposition.

Reading now from the deposition of Harvey Beffa, your Honor,—

THE COURT: Harvey—

MR. MCLAUGHLIN: —Beffa; B-e-f-f-a—Sr.—taken on the 27th day of April 1967 in St. Louis, Missouri. The Court will recall Mr. Beffa was identified as Executive Vice President of the corporation and Chairman of the Board.

On page 7 of Mr. Beffa's deposition:

"Q. Was there any discussion before the executive committee relating to this movement to the remaining major sales frontier?

"A. Well, there's always a discussion in general terms at the executive committee of our expansion program, which has always been the objective of moving nationally.

"Q. And in that connection, was there ever an interest discussed to your knowledge of building a brewery in that northeast area?

"A. No, sir."

[326] Skipping now to page 10 of the same deposition, toward the bottom of the page:

"Q. Does Falstaff compete with all of those nationals you named in their current marketing areas?

"A. You mean do we compete in all the areas that the nationals cover? Is this your question?

"Q. Yes.

"A. No, we're not fully covered on the 50 states and they are, but we would compete with them in the states where we're operating in of the 50 states."

On page 11:

"Q. Do you find that they are in all the states that you sell in, all three of those nationals?

"A. Generally so, I would say so, yes.

"Q. Has Falstaff been losing sales to these national brewers in the last two or three years?

"A. Yes, I think Falstaff has.

"Q. Has there been any discussion before the executive committee as to the means to stop this decline in sales in the last three years?

[327] "A. Certainly there has been. The predatory price practice of many of the nationals have been adverse to us in the economics of our operations, and there's always a discussion when your sales are declining as to what can be done to turn them around.

"Q. In that connection, were there discussions as to expansion into the northeast as a means to gain sales?

"A. Well, our policy, sir, as I said before, has been to expand and in the implementation of expanding we've got to look for certain opportunities. Certainly, the northeast has always been an objective in this national expansion, and when opportunities present themselves, as they did in the northeast and it being part of the objective, we went into the northeast."

On page 12:

"Q. Was there ever a time when the Falstaff Corporation decided they would go into the northeast by any means other than by acquisition?

"A. No, I think it would have been rather poor policy on our part to endeavor to get into the northeast without the basic opportunities presented [328] by an acquisition of the distributor organization, good facility, good management.

"Q. Is this the only means of entry discussed as to the northeast?

"A. Well, I answered your question before by saying that it never was our intention of capturing—and you're stressing the northeast—unless the opportunity presents itself that had the basic springboard to jump off of."

Now skipping to page 14, the bottom of the page:

"Q. Has Falstaff ever made a—since 1955 made an extensive survey into the possibility of building a brewery in any part of the United States?"

This is on page 15, the answer:

"Have we made an extensive study of building a brewery in any part of the United States?

"Q. Yes.

"A. I don't recall any specifics of building a brewery in any part of the United States.

"Q. Has it ever been considered generally that Falstaff would build a brewery in any part of the United States?

"A. Well, we certainly—our engineering department always are developing facts and figures [329] on new plants, but we have never specifically other than that southeast that I recall pointed toward any region of building a new brewery. We have never built a new brewery."

Now skipping to page 44, toward the bottom of that page.

THE COURT: 44?

MR. MCLAUGHLIN: 44, your Honor.

"Q. Was the distribution system of Narragansett discussed by the executive committee?

"A. Yes, sir.

"Q. What about that distribution system was discussed?

"A. The distributors, which is a distribution setup, and the type of caliber of people they were."

Now on page 45:

"Q. What was the conclusion of the committee as to the type of caliber of people they were?

"A. Quite favorable.

"Q. Was this one of the dominant factors of the acquisition of Narragansett?

"A. Very much so.

"Q. Is it difficult for a new brewer going into a new geographical area to acquire the good distributors?

[330] "A. Very, very much so.

"Q. Is this true also of a premium beer as well as a popular price beer?

"A. Well, I would suspect so. I don't handle premium beer. I can answer for myself that it's very, very important."

That concludes Mr. Beffa's deposition.

Now reading from the deposition of Karl K. Vollmer which was taken on April 28, 1967 in St. Louis. The Court will recall that Mr. Vollmer was identified as holding the position of Director of Planning at that time.

On page 10 of this deposition:

"Q. At what point did the increase—strike that. Did the increased competition from the national brewers in your area which you have mentioned earlier make inroads on Falstaff sales?

"A. I can't give any date of times of increasing pressure, all the time. I think it was probably felt, oh, in '57, '58.

"Q. Has that been a continuing thing from that period on?

"A. (Indicating yes.)."

That concludes Mr. Vollmer's deposition.

Reading from the deposition of Alvin Griesedieck, taken on the second day of May 1967 in St. Louis, Missouri, — The [331] Court will recall Mr. Griesedieck was identified as Vice President, Director of Marketing, at that time. On page 9 of the deposition:

"Q. Was there any particular reason prior to 1961, 1962 that Falstaff had not entered the Metropolitan area of Chicago?

"A. Yes, I would say there certainly was a reason; mainly one of feeling that the investment coupled with a lack of adequate distribution system, with those two factors plus a long standing feeling in the company that Chicago, Metropolitan Chicago was still somewhat dominated by undesirable elements. We just sort of stayed away from it.

"Q. When you say investment, sir, to what do you refer?

"A. The amount of money that would be required to do an adequate advertising and merchandising job.

"Q. When you refer to distributors, you mean the fact that Falstaff had no distributors within Metropolitan Chicago at that time?

"A. Right.

"Q. Did you take part in the decision of Falstaff to enter the Detroit market?

"A. Yes.

[332] "Q. At that time was, at the time of the entry into Detroit, was Falstaff then selling on the fringe areas of Detroit?"

The answer is on page 10.

"Not as close to Detroit. I would say we were in the area

of 50 miles away from Detroit, you know, prior to that time we entered the Detroit market."

Skipping now to page 19 of Mr. Griesedieck's deposition:

"Q. Was the construction of a new brewery discussed at any of the meetings at which you were present during '63 and '64?

"A. New brewery?

"Q. Yes, in the—

"A. Construction of it?

"Q. —eastern area.

"A. In the eastern area, no."

Skipping now to page 35 of the same deposition:

"Q. How did you gain your understanding that Falstaff would wait if Narragansett were not acquired?

"MR. FARR: I object. It doesn't appear that the witness had any such understanding.

"A. May I have that again?

(Whereupon, the previous question was read [333] by the reporter.)

"THE WITNESS: Well, it was just one of those things more or less taken for granted, that all of the whole concept and discussions about opening that area were dependent upon an acquisition. I mean, there was never any, just never conceived that we would think of opening it in any other fashion, so this is the reason I say there was never any discussion about it."

MR. CODY: Excuse me, your Honor. May we have a second on that question, please?

THE COURT: A second what?

MR. CODY: To consider that question, please.

THE COURT. I can't hear you.

MR. CODY: I would like to read the question again and have a second to consider it.

THE COURT: Mrs. Archambault will read it to you.

(Last question and answer, as read by Mr. McLaughlin, read by reporter)

MR. CODY: Very well.

MR. MCLAUGHLIN: Skipping now to page 44 of the same deposition,—Actually the first question, I believe, is on the bottom of page 43.

"Q. Since you have become marketing [334] director, have you been involved in any discussions as to the building of an East Coast brewery?

"A. No.

"Q. Has there been any discussion to your knowledge since 1960 pertinent to the building of a brewery in or around Baltimore, Maryland?

"A. No."

That concludes the depositions which we have at this time, your Honor.

MR. GORING: I have some exhibits to offer, your Honor, and I am going to offer the first several one by one, but almost contemporaneously. The Government will object to them all, I think.

Annual report of Falstaff Brewing Corporation for the year 1965; annual report of Falstaff Brewing Corporation for the year 1966; a like report for the year 1967; another like report for the year 1968; and another like report for the year 1969.

And I ask that they be marked severally Defendant's Exhibits A, B, C, D, and E.

MR. CODY: We object, your Honor.

THE COURT: What is the objection?

MR. CODY: The objection, your Honor, is that they constitute post-acquisition evidence.

[335] THE COURT: They constitute post-acquisition—

MR. CODY: —evidence. We feel the acquisition should be measured as of the time of the acquisition and not by evidence adduced by defendant relating to periods after the acquisition.

In this connection we have briefed what we consider to be the law on post-acquisition evidence and would seek to hand up as many copies of the brief as the Court would like.

THE COURT: I would like to consider any authorities you may have on the issue certainly.

[336] THE COURT: Did you get a chance to consider this memorandum, Mr. Goring?

MR. GORING: No, your Honor, but I recall that in the pretrial brief of the defendant this matter is considered at some length at page 22. The Government's pretrial brief does not mention this situation. Ours does. And I am content if you are to have you examine both memoranda to the

extent that you think you would like to before making a ruling on this matter.

All that we have to say is said in there except you will recall I suggested to you that Mr. Justice Black in U.S. against Pabst Brewing Company, which is cited in the defendant's pretrial brief at pages 6 and 25—

THE COURT: Also cited in this brief of the Government, United States against Pabst Brewing Company, 384 U.S. 526.

MR. GORING: That seems to be the correct citation. The Government can take very little heart from that in the light of the emphasis which Mr. Justice Black placed almost entirely as far as this is concerned upon the post-acquisition market share behavior.

My associate who has had an opportunity to read the Government's latest admission while you and I have been speaking, calls attention to the fact that the authorities in that memorandum do not support the proposition at all, that evidence [337] of this kind is inadmissible. They deal with the necessity of weighing it with some caution upon consideration of the merits of the case, and with that I do not disagree.

THE COURT: I think in fairness to the Government, the second paragraph of this memorandum the Government does make the concession that it does not contend that such evidence is always inadmissible.

MR. CODY: That's correct, your Honor, and in some cases post-acquisition evidence showing anticompetitive effects after an acquisition is relevant. However, postacquisition evidence to show what would have been, what would be the condition today had this particular acquisition not taken place—in other words, let me make myself clear, if the evidence to be introduced was such as to show that after the acquisition anticompetitive effects had indeed been felt in the marketplace, that would be admissible.

THE COURT: It would seem to the Court common justice would dictate if the evidence indicated the other way ought to permit a defendant to introduce it.

MR. CODY: On the other hand, how can we tell now in 1970 what would have been the competitive effect of Falstaff's independent entry by looking at what's happened after the acquisition has been accomplished and completed? In that connection we urge very strongly that such evi-

dence be given very [338] little weight and certainly very cautious analysis that I'm sure the Court will give it.

THE COURT: I think the weight to be given to the evidence is up to the Court, but I feel it is clearly admissible. I will allow it. We will take our usual morning recess now.

(RECESS)

THE COURT: Those may be marked as Defendant's exhibits.

THE CLERK: Annual Report, 1965, Defendant's Exhibit A; Annual Report, 1966, Defendant's B; Annual Report, 1967, Defendant's C; Annual Report, 1968, Defendant's D; and Annual Report, 1969, Defendant's E.

THE COURT: They may be so marked. The plaintiff's objection to the Court's ruling has already been noted.

(Above-described documents marked Defendant's Exhibits A through E.)

MR. CODY: Your Honor, as I understand it, the defendant will commence calling witnesses at this time. In that connection, first of all, I would like to introduce to the Court Dr. Hyman Ritchin, who is an economist with the United States Department of Justice, assigned to our field office, and request that he be permitted to sit at counsel table.

THE COURT: No objection by the Court, surely.

ALVIN KACIN, Sworn

DIRECT-EXAMINATION BY MR. GORING

Q. Mr. Kacin, your full name?

[339] A. Alvin Kacin.

Q. Where do you live?

A. St. Louis, Missouri.

Q. Speak up a little louder. The acoustics are quite bad.

A. St. Louis, Missouri.

Q. How old are you?

A. 38.

Q. By whom are you employed?

A. Falstaff Brewing Corporation.

Q. In what capacity?

A. I am manager of the marketing research department.

Q. Tell me briefly what your educational history is following high school?

A. I am a graduate of St. Louis University, Bachelor, 1955, in marketing. I have taken selected graduate courses at Washington University.

MR. GORING: Can you hear the witness?
THE COURT: Not too well.
THE WITNESS: Do you want me to repeat that?

Q. What are your responsibilities with Falstaff Brewing Corporation?
A. My primary responsibility is data collection and analysis of beer-industry statistics and consumer-research information.
Q. How long have you been doing that kind of work for Falstaff?
A. For Falstaff, eight years.
[340] Q. Do you have a staff of personnel underneath you?
A. Yes, sir.
Q. Who work at your direction?
A. Yes, sir.
Q. And under your supervision?
A. Yes, sir.
Q. Now, did you prepare for me and for use at this trial some data concerning the brewing industry, market shares and other like things?
A. Yes, sir.
Q. I will show you this paper.

MR. CODY: May we have that marked?
MR. GORING: You may have it marked in due season which will be quite shortly.

Q. How many sheets of paper are there in that document I just handed you?
A. There are eight sheets.
Q. In the most general terms tell me what is contained in this document. No details, just general terms.
A. It contains brand-share and volume information for New England states and nationally.

MR. GORING: I ask this be marked as Defendant's Exhibit F.

MR. CODY: Objection, your Honor.
[341] THE COURT: What is the objection?
MR. CODY: The objection, your Honor, is twofold. First of all, as to the years 1965, 1966, 1967, 1968 and 1969, that it

is postacquisition evidence and I wonder, your Honor, since it would appear to me that much of the defendant's case will consist of postacquisition evidence that we could have a standing objection.

THE COURT: Certainly.

MR. CODY: Of anything that pertains to anything that took place after on or about July 15, 1965.

THE COURT: Well, that is quite a broad objection. I think it would be better for the record if specific types of evidence are offered your objection be noted.

MR. CODY: Very well, your Honor.

THE COURT: On the ground it is postacquisition evidence.

MR. CODY: Very well, We will make the same objection each time. Now, as to the 1964 figures on the chart—

THE CLERK: It hasn't been marked yet.

THE COURT: The Clerk will mark that Defendant's F.

MR. CODY: For identification?

THE COURT: No. I am ruling it may be made a full exhibit.

MR. CODY: I haven't completed my objection.

THE COURT: Go ahead. I will let you complete your [342] objection. Perhaps I was a little hasty. I thought you had.

MR. CODY: As to the 1964 figures on the chart, we object on the ground that they are inaccurate to the extent that in the 1964 column, the fifth line up—

THE COURT: Up?

MR. CODY: From the bottom, they group Ruppert and Rheingold figures. Now, first of all, and if I may say, Rheingold is the Liebmann Brewing Corporation.

THE COURT: The what?

MR. CODY: Liebmann Brewing Corporation has become the Rheingold Brewing Corporation. I think perhaps Mr. Goring may have made a mistake before when he said that Liebmann Brewing Corporation didn't sell in New England. As a matter of fact, it did. Its name is Rheingold, and from this very chart which he seeks to offer we can see there were sales made in New England by that corporation.

However, the sales of Rheingold appear to have been combined with the sales of Ruppert in 1964. Now, Rheingold accquired by only on or about November of 1965, so therefore the chart is misleading as to what the top eight brands have.

THE COURT: What do you say to that?

MR. GORING: I suggest to the extent the Government can show that all the main part of this exhibit is [343] erroneous it may do so at the appropriate time, but it is not appropriate to raise that kind of objection with respect to its admissibility.

THE COURT: I think that is a fair observation, Mr. Cody. If some specific item in this exhibit is inaccurate, certainly the Court will permit you to demonstrate that fact. If there is any explanation for this item I will permit the Government, the defendant, rather, to make that explanation.

MR. CODY: Very well, your Honor.

THE COURT: It may be marked.

THE CLERK: Defendant's Exhibit F.

(Chart consisting of eight pages marked Defendant's Exhibit F.)

[344] Q. (By Mr. Goring) Mr. Kacin, I now hand you a document that you saw a few moments ago which is marked Defendant's Exhibit F. Would you tell me first on the basis of what source materials did you prepare that document or have it prepared?

A. Some four of the individual states supply information from tax records by brands as shown. The states are estimated by our department.

THE COURT: Are estimated totals?

THE WITNESS: Yes.

THE COURT: Keep your voice up, please.

THE WITNESS: Are estimated by our department in conjunction with our sales force and our distributors. Two of the pages come from the U.S. Brewers Association official records.

Q. Can you identify the states from which you get official records in one fashion or another?

A. Yes, they are Maine, Vermont, Massachusetts and Rhode Island.

Q. Now, what are the states from which you do not get official information?

A. New Hampshire and Connecticut.

Q. What information do you have about beer sales in those two states?

A. In those two states we have a total beer volume brands sold—

Q. Does that come from an official source?

A. Yes.

[345] Q. How do you allocate the gross figure which I take it you get from those states to the various brands?

A. There are two methods. Once yearly our distributors supply us with their estimate of what the various brands in their market sell competitive rating; our own field sales force supplies this information also. And through consumer investigation of beer drinkers' preferences, we are able to put together a share estimate for each of the major brands in the state which applies this percentage to the total per volume that we are given to arrive at the individual volumes.

Q. Is that a recognized standard procedure, market analysis?

A. Yes, sir.

Q. In your judgment does it produce reasonably accurately even though an approximate result?

A. Yes, sir.

Q. Now, take us over this exhibit and tell us page by page what it shows.

A. For the State of Maine the share of market indicates that the top two brands, Budwieser and Shlitz, have had an increase in share over the six-year period shown here.

Q. From what percent to what percent?

A. From 15.3% in 1964 for Budwieser to 26.7% in 1969. Shlitz from 11.5% to 13.3% in 1969. Miller was 1.4 in 1964 and 2.3 in 1969. Pabst was 3.4% in 1964 and 5.4% in 1969. Schaefer was 1.2% in [346] 1964 and 2.7% in 1969. Carling was 10.8% in 1964 and 11.1% in 1969. Standard is 1.0% in 1964, had ceased operation in 1969. The Dawson brand was 5—excuse me. 4.5% in 1964, 2.7% in 1969. Schmidt was 4.5% in 1964 and 3.3% in 1969. Ballatine was 4.5% in 1964 and 2.0% in 1969. The combination of Rheingold-Rupp were 8.2% in 1964 and 7.3% in 1969.

Q. Let me stop you there. Why did you combine Rheingold figures in '64?

A. To show the trend line in that combination over the six-year period.

Q. So that those figures would be comparative with the later years?

A. Yes, sir.

Q. Continue, Mr. Kacin.

A. The Narragansett group of brands which includes

Krueger, Heffenreffer, Hanley and Croft; 27.8% in 1964. 20.0% in 1969. The Falstaff brand was not available in '64 and accounted for 0.2% in 1969.

Q. Now, let me stop you there again. In 1965, the year of acquisition and in 1966, in spite of the combination, and apparently no beer, no Falstaff previously was sold in Maine in those two years—

A. That's right.

Q. Let me ask you another question as far as Narragansett figures are concerned. Of course, those are not estimates. You have [347] those in your own files?

A. Yes.

Q. Carry on.

A. All of the other brands available for sale or combined in total that represent 5.9% in 1964 and 3.0% in 1969.

Q. Now, turning to page 2 of Exhibit F, I take it that the various columns carry on the same pattern and show the same thing with respect to beer sales in Vermont?

A. Yes, sir.

Q. And to the same effect, page 3, New Hampshire sales?

A. Yes, sir.

Q. Similarly, Connecticut, the following page?

A. Yes, sir.

Q. And similarly Massachusetts on the following page?

A. Yes, sir.

Q. Similarly, Rhode Island on the next?

A. Yes, sir.

Mr. Cody: Excuse me, Your Honor. Am I to assume when counsel asks if they follow in the same pattern counsel is simply asking the witness if these—if this is the same information by subject that is contained on each page, rather than a pattern of increased growth by any corporation or decrease in the sales by any corporation?

Mr. Goring: I am talking about the pattern [348] of these papers as they were prepared.

Mr. Cody: By subject?

Mr. Goring: I think I have said all I can say.

Mr. Cody: Very well. I think the pages speaks for itself.

Mr. Goring: So do I.

Q. On the following page is a little different data. Can you tell us what that is?

A. The information indicates the production capacity of

the top ten brewers for the United States, ranking from highest to lowest. It shows, for example, that the year reported 1969 Anheiser Busch had a product capacity of 22,300,000. Shlitz Brewing Company has a capacity of 17,450,000, and so on down.

Q. So on down the page?

A. Yes, sir.

Q. And the typed heading on that page accurately describes what it discloses?

A. Yes, sir.

Q. And the final page of Exhibit F?

A. The final page indicates the total industry sales in the United States and the total annual sales over a ten-year period for the first ten brewers as of 1969.

Q. And comparing the sales of Falstaff beginning with the year 1966, [349] comparing through the year 1969, which means there was a combined Falstaff-Narragansett operation, in those years there was a decline, was there not?

A. Yes, sir.

Q. From what barrelage to what barrelage?

A. The year 1969 Falstaff total barrels, 4,911,000. In 1961, 5,128,000; 1962, 5,310,000; 1963, 5,548,000; 1964, 5,820,000; 1965, 5,704,000; 1966, 5,649,000; 1967, 5,382,000; 1968, 5,108,000; 1969, 5,030,000. Those are exclusive of the Narragansett brand sales. They include the Falstaff brand.

Mr. Cody: Your Honor, at this time I would like to make an objection to one portion of this document, which is on the next to the last page, the bottom notation, where it says, "New brewery construction offers, in addition to increased production, substantially decreased production costs through labor savings, thus furthering the advantage of the large well-financed brewers over the regional and local brewers. Information on this was included in data previously submitted." This seems entirely extraneous to this report, and it is not substantiated by anything in the record, unless the witness wishes to testify to it, it's in effect testimony.

Mr. Goring: I suggest, Your Honor, that it is undoubtedly an area for cross-examination, and any impropriety should be disclosed adequately through the record [350] by cross-examination.

MR. CODY: I don't think, your Honor, there is any foundation laid for admitting it.

THE COURT: Frankly, I will not be affected by that recital absent some showing of qualifications of the witness to express any such opinion.

MR. CODY: May we strike that from the document, your Honor, on the record?

THE COURT: Well, perhaps in fear of clarity we might just as well. It is a gratuitous observation.

MR. GORING: What page are we talking about?

MR. CODY: It's the next to the last page on the bottom.

THE COURT: At the moment it seems to be purely gratuitous. It's a gratuitous observation by the individual who has prepared this document, and I assume the witness did.

MR. CODY: Perhaps Mr. Goring can ask him about it.

MR. GORING: I am quite prepared to suggest that the Court should, and properly, disregard that note and disregard it with my full approval.

MR. CODY: May we stipulate that that is out?

MR. GORING: Mr. Cody, I have put my position on the record frankly and completely.

[351] MR. CODY: All right, the Government moves that that be struck from the document, your Honor.

THE COURT: Well, I don't known how you're going to do it. It's a matter of mechanics, unless you cut it off, it's in there. It will be disregarded by the Court. You can be sure of that.

MR. CODY: Very well, thank you, your Honor.

Q. Now, Mr. Kacin, I show you a piece of paper which has a typewritten legend and colorlines upon it, and ask you what that is, not in detail, just tell me grossly what it is.

A. It is a graphic presentation of the eleven-year or ten-year, I'm sorry, volume trend of the leading national brewers.

Q. What is the relationship of that graph to the material contained in Defendant's Exhibit F?

A. For the two leading brewers in the nation, Antheiser Busch and Shlitz, it shows on the same trend nationally as they did in the New England states.

Q. Does it, in fact, reproduce in graph form the information contained in Defendant's Exhibit F?

A. Yes, sir.

Q. Was it prepared by your staff under your direction and supervision?

A. Yes, sir.

MR. CODY: Excuse me. We'd appreciate seeing [352] a copy of it.

MR. GORING: You will see a copy before I offer it.

(Mr Cody views document.)

MR. CODY: Thank you. After Mr. Goring introduces this exhibit for identification, your Honor, I would respectfully ask the Court for an opportunity to study it along with other counsel. I don't see how we will be able to make a study of it in two or three minutes here. I would like at least the noon hour to study this before it's admitted into evidence and before we make a timely objection. I would also, your Honor, note for the record, if I might, that we object to it, since it shows post-acquisition evidence.

MR. GORING: I am now offering this into evidence as a full exhibit.

MR. CODY: I can't very well object to it, your Honor, without studying it and comparing it with some of our own data.

THE COURT: Well, I will mark it temporarily in evidence for identification and during the noon hour you can examine it, if you wish.

MR. CODY: Thank you very much.

THE COURT: Defendant's Exhibit G for identification.

[353] (Graph form introduced and marked Defendant's Exhibit G for identification.)

Q. Now I show you another piece of paper containing a graph and ask you what this is.

A. This is a graphic presentation of the total volume for the leading sellers in New England for the years 1964 through 1969.

Q. And with respect to the New England states and the brewers, it this anything more than a graphic reproduction of the data contained as to those states in Defendant's Exhibit F?

A. That's correct. Nothing more than that.

MR. CODY: May I make the same request as to this document, your Honor?

THE COURT: Yes, certainly.

MR. GORING: I offer this in evidence as a full exhibit for the defendant, your Honor.

THE COURT: It may be marked Defendant's Exhibit H for identification.

(Document containing graph introduced and marked Defendant's Exhibit H for identification.)

MR. CODY: I would also note for the record, your Honor, that that be subject to the same opportunity for counsel of the Government to examine it.

THE COURT: Yes.

MR. CODY: I will also note in this connection [354] the pre-trial order required the Government to be given access a number of days before trial to Exhibits that were to be introduced. These come as a complete surprise.

MR. GORING: That is not correct. The pretrial order deals with things which are called documents. That is not a document in that sense.

THE COURT: Well, you will have until the two o'clock recess to examine it. You make whatever comments you care to make at that time.

MR. CODY: Thank you very much.

THE COURT: Anything further?

MR. GORING: Does your Honor suggest we take the noon recess now?

THE COURT: We normally do at 12:30. If you are not ready to proceed—

MR. GORING: I am ready to proceed, your Honor. I just want to ask my colleague a question.

THE COURT: Well, in any event, it is close to 12:30, so we will stop here until two o'clock.

(Whereupon noon recess taken, 12:28)

[355] *THURSDAY, OCTOBER 8, 1970*

(AFTERNOON SESSION)

(Court reconvenes at 2:00 P.M.)

(Mr. Kacin resumes stand for further examination by Mr. Goring)

Q. (By Mr. Goring) Mr. Kacin, I hand you Defendant's Exhibit G for identification and ask you to tell me in words

for the record what that graph shows. In other words, what does the left-hand vertical column show? What does the bottom column show? And what illustratively does one or two of the colorlines show?

MR. CODY: Objection, your Honor.

THE COURT: What's the objection?

MR. CODY: That seems to be a very unclear question. I'm not sure that I understand it.

THE COURT: Well, do you want it read back? It seems clear to me.

MR. CODY: And second of all, your Honor, it's already been shown that these charts were illustrative of the exhibit placed into evidence just before by the defendant. Perhaps if I could have the question read back, I might understand it better.

(Previous question read back.)

MR. CODY: Withdraw the objection, your Honor.

THE COURT: The objection is withdrawn. You may answer.

[356] A. The left-hand column shows in millions of barrels the scale from 0 to 18,000,000. The bottom horizontal column shows years from 1960 through 1970 with no data indicated for 1970. The two top lines on the chart show the Anheiser Busch volume rising from approximately eight and a half million barrels in 1960 to somewhere in the area of 22,000,000 in 1969. The line indicating Shlitz shows Shlitz going from about 5.8 million barrels in 1960 to approximately 13 million in 1969. The other lines indicate the trends of the various breweries over the same period of time.

Q. Now I will show you Defendant's Exhibit H and ask you to give it the same treatment. Tell us first for the record what areas it covers, then give it the same treatment as you did Exhibit G.

A. The left-hand column, again, is millions of barrels. It's a scale that runs from 0 to 1.8 million barrels. The horizontal scale on the bottom are the years 1964 through 1969. The two top lines, the black line, for Anheiser Busch, shows Anheiser Busch going from slightly over 600,000 barrels in 1964 to about 1.7 million barrels in 1969. The solid red line for Narragansett brand excluding Falstaff

brand from that grouping shows Narragansett going from slightly under 1,300,000 barrels in 1964 to approximately 1,150,000 in 1969.

Q. Now, Exhibit H shows sales in New England, is that right?

A. Yes.

[357] Q. The six New England states?

A. Yes.

Q. And Falstaff sales in those states are not on this graph?

A. No, sir.

Q. Why not?

A. The sales of the Falstaff brand are too small in volume to appear on the chart. They would be of a solid line almost at the bottom.

MR. CODY: Objection, your Honor. I don't see why that should be permitted to remain in the record.

THE COURT: Meaning what?

MR. CODY: Meaning, your Honor, it is prejudicial.

THE COURT: In what way—I would assume you mean the last factual statement that the witness made?

MR. CODY: Yes, Your Honor. I would assume that if the defendant wished to include in the chart Falstaff brand sales, the chart could have been so made to include them and for the defendant to make a shot and then to ask why on its own chart, why these sales were not included, and then to explain with a self-serving statement like that, I think it is highly objectionable, and the Government does object to the answer and asks that the answer be stricken.

[358] THE COURT: Well, certainly it won't carry any weight with the Court, in any event. I don't know why the sales of Falstaff, the defendant, were not included on the chart. It would have been material, it seems to the Court. I will order that part of the answer stricken from the record.

MR. CODY: Thank you, your Honor.

MR. GORING: I will offer those two exhibits as full exhibits, your Honor.

MR. CODY: We object to Exhibit G for identification, your Honor, in part, again, the top of the exhibit. There are two self-serving statements. The first one reads, "Past decline in 1969 due principally to the sale of Pabst brands. There is no evidence in the record as to this. Second of all,

the very last source note, and indeed, neither of these are sources, 1965 sales of all breweries were affected by national strikes in various degrees.

THE COURT: Where are you reading from?

MR. CODY: I am reading from Exhibit G for identification, Your Honor, offered by the Defendant. There is no proof in the record of this.

THE COURT: Well, I think it is superfluous and frankly, we are interested in what the sales were, that's all. They will be admitted for that limited purpose, to show the relevant sales. The Court isn't concerned with any explanation. It may remain as a full exhibit, and plaintiff's objection to the Court's ruling, of course, is noted. Do you want that back, Mr. Goring?

MR. GORING: You might retain it, your Honor, in case there is examination on them.

(Exhibits G and H received as full exhibits.)

MR. GORING: You may inquire, Mr. Cody.

CROSS-EXAMINATION BY MR. CODY

Q. (By Mr. Cody) Mr. Kacin, do you have before you, sir, Defendant's Exhibit F for identification?

THE COURT: F is a full exhibit.

(Document handed to witness.)

Q. Now, with reference to that document, sir, would you name the top eight sellers of beer in New England in 1964, is that possible?

A. No, not from here. The six individual states have to be totaled to get the top sellers.

Q. That would have been calculated from these, is that correct?

A. Yes, sir.

Q. Now, in 1964, I notice from Defendant's Exhibit F that Rheingold and Ruppert sales are given as a combined figure.

A. That's right.

Q. Are you familiar with the fact that Rheingold and Ruppert were [360] independent brewers of beer at that time?

A. Yes.

Q. Well, then, why were these figures combined for the purpose of this chart, Exhibit F?

A. The chart was put together to show a six-year trend. After that combination, Rheingold and Ruppert would no longer report it separately, so in order to show a trend we combined the two for 1964.

Q. You say they were no longer reported separately after they were combined?

A. Right.

Q. Do you have any idea of when they were combined?

A. I believe it was 1965.

Q. About November?

A. I don't know the exact date.

Q. What is your best recollection?

A. Sometime in 1965. I couldn't put a date on it.

Q. Late 1965?

A. I don't know that, sir. I'd have to look at the document to see.

Q. In other words, then, taking your chart, which is Exhibit F, and calculating insofar as 1964 is concerned, the top eight sellers, which would include the Rheingold-Ruppert combination, which did not then exist, we would be actually considering the top nine sellers, is that not correct?

THE COURT: Nine? How do you arrive at the figure nine? I have in front of me as far as Maine is concerned—

MR. CODY: Your Honor, we are talking about the top eight leading sellers. If we take 1964, the column in Defendant's Exhibit F, and count off the highest percentage sellers—

THE COURT: I see. You have selected—

MR. CODY: Rheingold and Ruppert would be included, your Honor, so we would actually be talking about at that time, nine sellers, because Rheingold and Ruppert is a combined figure of two independent firms.

THE WITNESS: I can answer that question better if I could have the chart back.

(Chart handed to witness.)

THE WITNESS: The indications are that Rheingold would remain in the top eight whether or not Ruppert was included or not. In other words, the inclusion or exclusion of Ruppert from the total should not pull rank over the other top eight.

Q. Well, in other words, in 1964, could you name the top eight for me?

A. Yes—in New England?

[362] Q. Yes.

A. My best recollection is that it would be Narragansett, Rheingold, Budwieser, Schaffer, Carling, Ballantine, Schlitz and Pabst.

Q. What about Ruppert?

A. Ruppert, I don't have information in front of me to say whether or not Ruppert would have been in that total.

Q. Have you done any extensive research into the beer sales in New England?

A. Yes.

Q. Have you discovered any figures that indicate that Ruppert in 1964 was the number 2 seller in New England?

A. I don't have those figures in front of me.

THE COURT: Number 2 seller in New England?

MR. CODY: In New England, your Honor.

THE COURT: I thought you were dealing with Maine. Are you dealing with all the New England states?

MR. CODY: With the entire New England area, your Honor.

Q. In other words, you don't know whether—you can't tell me right now whether Ruppert was within the top eight sellers in New England in 1964?

A. No, I can't.

Q. Yet you have done extensive research?

[363] A. I don't have the information in front of me.

Q. Do you have it with you?

A. No, I don't.

Q. In any event, it is clear, is it not, that Defendant's Exhibit F, in taking the top eight brewers, with the top eight percentages, this is New England now, your Honor, the top eight brewers in New England with the top market shares includes as one unit in 1964 Rheingold and Ruppert, which at that time was not a combination, but two separate corporations?

A. That's right.

Q. So actually, nine brewers rather than eight.

A. I'll have to examine—

Q. Would you please.

A. Rheingold and Ruppert separately in order to answer that, but in our exhibit Rheingold and Ruppert separately,

in order to answer that, but in our exhibit Rheingold and Ruppert are combined to indicate the trend.

Q. All right, Let me put it another way. Perhaps we can make it clearer. Referring to Defendant's Exhibit F, if you would rundown the market shares in the second column pertaining to 1964, would you please tell me that top eight market shares?

A. For which area?

[364] Q. All right. I won't put you to do it state by state. What I am saying is—

A. We can do it state by state.

Q. (Continued)—if you did do it state by state this way, would we be not including Ruppert and Rheingold as one entity in 1964, combined?

A. On our exhibit, yes.

Q. And, in fact, they were not one entity.

A. That is right.

Q. So, if we were to count down eight percentage shares, we would actually be including existing companies at that time, in 1964.

A. Yes; you would be including two companies as one.

MR. CODY: We have nothing further, your Honor.

MR. GORING: That is all, Mr. Kacin.

MR. MCLAUGHLIN: I call at this time Mr. Norman Thomas as a witness, your Honor.

NORMAN J. THOMAS, Sworn.

DIRECT EXAMINATION BY MR. MCLAUGHLIN

Q. Would you state your name, sir?

A. Norman J. Thomas.

Q. Where do you live, Mr. Thomas?

A. In Montclair, New Jersey.

THE COURT: Just a minute. What is it?

[365] MR. CODY: Your Honor, may I say that the pretrial stipulation requires the defendant to notify us the day before of the witnesses that it intends to call. I represent that we have been notified that the next witness would be Mr. Ira Horowitz, an economist, and not Mr. Thomas. So, therefore, I would like to reserve any additional time we might have to prepare for cross-examination of Mr. Thomas. That is the reason why we have Dr. Ritchin pres-

ent this afternoon. We fully expected economic testimony, as reported to us by the defendant.

MR. GORING: If the Court please, I represent to you that I advised counsel for the Government that Mr. Thomas and Mr. Horowitz would be testifying today. I did not specify the order in which they would be called. I am not required to under the pretrial order.

THE COURT: What do you say to that?

MR. CODY: It may be a misunderstanding.

THE COURT: You may proceed.

Q. By whom are you employed, Mr. Thomas?

A. I didn't hear you sir.

Q. I am sorry?

A. I did not hear you, sir.

Q. By whom are you employed?

A. P. Ballantine & Sons.

Q. Where are they located?

[366] A. In Newark, New Jersey.

THE COURT: Ballantine?

MR. MCLAUGHLIN: P. Ballantine & Sons.

Q. That is a brewing corporation. Is that correct, sir?

A. Yes.

Q. What is your capacity with that company now?

A. Inside consultant.

Q. Were you employed by the Falstaff Brewing Corporation?

A. Yes, I was.

Q. In 1950 through 1963. Is that correct?

A. Yes, sir.

MR. REPETTO: Your Honor, could I ask the witness to move the microphone away from his mouth? Sorry, sir. I can't hear you.

THE COURT: 1950 to 1963 he was employed by the defendant.

MR. MCLAUGHLIN: That is correct, your Honor.

Q. What was your capacity with Falstaff in 1963?

A. I was manager of new market expansion.

THE COURT: Manager—

THE WITNESS: —of new market expansion.

Q. Was it part of your job at that time to make surveys for the company to determine the feasibility of opening new markets?

A. Yes, it was sir.

[367] Q. Were you ever, during the period that you occupied that position with Falstaff, requested by the Falstaff management to make any survey or feasibility study regarding their entry into the New England market?

A. No, sir.

Q. In your opinion what would have been a prime or essential requirement for Falstaff to have, should it desire to enter the New England market?

MR. CODY: Objection, your Honor.

THE COURT: What is the objection?

MR. CODY: I don't think there is any foundation laid—

THE COURT: What is that?

MR. CODY: I don't think there is any foundation laid as to the witness's competence to discuss building—

THE COURT: He was employed for 13 years as manager of new markets. I suppose that involved the study of prospective markets by him, did it not?

MR. CODY: I am not sure what he did, your Honor.

THE COURT: Perhaps if you amplified it.

MR. CODY: We know his responsibilities. I don't know what he really did.

Q. As manager of new market expansion what would you do; what kind of information would you gather; and how would you go about ascertaining the feasibility of an entry into a new market?

[368] A. It would be as total and complete as possible. Usually when I went into an area in which we were not marketing our product I would visit the individual state beer association, talk with the secretary to sort of get a feel of the market. I would go to the state Alcohol Beverage Control Board and get their laws and regulations—rules and regulations. I would acquire a listing of distributors. And then I would start out—And I would also visit the Chamber of Commerce to find out the labor climate and whatever other material I could get from them regarding the economic conditions in that particular state. And then it was a question of getting into a car and just dropping throughout the state to visit the various distributors and just sit down and talk it up.

Q. Did you study the market in terms of the existing brewers in that area?

A. Oh, yes, indeed.

Q. And the business they were doing in that area?

A. Yes, indeed.

Q. And the price structure in that particular area?

A. That was one of the important aspects of it.

Q. And the number of brewers doing business in the area?

A. Yes.

Q. The existing capacity in the area in reference to the total sales?

[369] A. Yes, indeed.

Q. Were all those factors that you took into account?

A. Oh, yes, indeed.

Q. Now with reference to the New England market, what in your opinion, based on your experience, would Falstaff have had to have in order to make an entry into that market?

MR. REPETTO: I object to that, your Honor. The witness has already testified he made no studies as to the New England market, and the question put to him now is what factors would be influential in going into that market. Since he has testified he has not investigated the market, I believe that he is unqualified to state the factors necessary.

THE COURT: I don't think that is quite the question being propounded. As I understand it, the question is what facts would be considered before you entered into such a market. Is that it?

MR. MCLAUGHLIN: Into the New England market, your Honor.

[370] MR. MCLAUGHLIN: The New England market, your Honor.

THE COURT: He hasn't said the New England market.

MR. MCLAUGHLIN: Maybe I can qualify him with some other questions.

Q. Did you ever occupy any position in the New England market?

A. Yes, sir, I did.

Q. What was your experience in New England and New York?

A. I was at that time in the soft-drink business. I was regional sales manager for Orange Crush Company, and I had all of New England, New York State, and one in Buffalo and one in New York City.

Q. Were you familiar with the market in that respect?

A. Yes, I would say I was.

Q. Would you say you were familiar with the beer market in New England?

A. Several of our bottlers were beer distributors in the New England states.

Q. And in your opinion what would be necesary for Falstaff to have—

MR. REPETTO: Your Honor, may we have the witness' qualifications as a soft-drink agent, as to what time this position was held?

Q. What year were you involved with the Orange Crush Company in the New England area?

[371] A. 1941 to 1950.

Q. Approximately 11 years?

A. Ten years, sir, nine and a half.

Q. Based on your experience and knowledge of that market, what would Falstaff have to have to enter that market?

A. It would have to have a strong well-knit distribution organization.

MR. REPETTO: I object to that, your Honor. The question was without the year, without a time. The witness' qualifications in New England went from 1941 to 1950.

THE COURT: I think perhaps your objection goes to the weight rather than admissibility. I think it is quite remote, frankly.

MR. MCLAUGHLIN: You may inquire.

MR. REPETTO: I have no questions, your Honor.

THE COURT: Very well. You may step down, sir.

IRA HOROWITZ, Sworn

DIRECT-EXAMINATION BY MR. GORING

Q. What is your profession, Mr. Horowitz?

A. Professor of economics; professor of business administration, but I am an economist.

Q. At what institution?

A. Indiana University.

Q. How long have you held that position?

A. 11 years.

[372] Q. Let me have your educational background from high school on.

A. I took my undergraduate degree, my B.A. in economics at the Johns Hopkins University in 1955. From there I entered M.I.T., and I took a Ph.D. in industrial economics at M.I.T. in 1959.

Q. What was your major field while you were at Johns Hopkins?

A. Economics.

Q. You wrote a thesis there?

A. Yes, I wrote a Bachelor's dissertation on the supplies and demand in the synthetic rubber industry.

Q. What did that involve from the standpoint of research?

A. It was a year-long study of attempts to estimate the supply of synthetic rubber and the demand for synthetic rubber in the United States, using econometric techniques.

Q. A study in depth of a phase of that industry I take it?

A. Oh, yes. That was subsequently published in revised form after I knew a little more and could improve it a bit.

Q. Now, your field of interest while you were at the Institute of Technology?

A. My major areas were in economic theory, industrial organization, econometrics; and minor area in mathematics, and I wrote my dissertation on the economics of industrial research.

Q. Will you just describe that so we understand it a little [373] more clearly?

A. Yes. I attempted to perform a theoretical economic analysis to indicate factors that go into determining the level of a firm's research and development expenditures, and this was combined with an empirical analysis of the factors that affect the level of research expenditures. And in turn also attempted to determine whether the extent to which research and development is a profitable activity for individual firms.

Q. Did you earn academic honors in your work at either Johns Hopkins or the Institute of Technology?

A. Yes. I was graduated from Johns Hopkins with honors,, and I was awarded the Woodrow Wilson fellowship to M.I.T.; subsequently at M.I.T. a fellow; and my last two years at M.I.T. I was a teaching associate. I think I was promoted to instructor, as I remember.

Q. Were you elected while in college to any honorary society?

A. Yes, a member of Phi Beta Kappa as an undergraduate; subsequently to Beta Gamma Sigma which is the honorary business fraternity.

Q. Before joining the faculty of Indiana University, did you serve on the faculty of any other institutions?

A. Before joining Indiana University I did do some teaching, as I indicated, as a graduate student at M.I.T. I then [374] went to Kansas City and spent a year at the Midwest Research Institute, but I also while in Kansas City taught at the University of Kansas.

Q. Have you served any other institutions of learning in the capacity of visiting professor?

A. I visited as a visiting—visiting research, Berkeley, University of California at Berkeley, and I spent a year as visiting professor at the Catholic University of Louvain in Belgium.

Q. What was your academic interest in the service at these other institutions?

A. You mean—I'm sorry. Do you mean at Indiana or at the other?

Q. What field—

A. Oh, yes, I see. I teach a variety of fields including mathematics, operations research, statistics, economic theory. I have taught in industrial organizations, advanced quantitative methods of business analysis.

Q. Now, have you been engaged during your professional career in nonacademic assignments of any kind?

A. Well, I do quite a bit of research and quite a bit of writing. My research projects have been many and varied. I have done quite a bit of research in various areas of industrial organization micro-economic theory, and just [375] generally the analysis of business problems. Particularly I have been concerned with the analysis of mutual-fund performance in industrial organizations. I have been quite interested in the brewing industry and have done any number of studies on the brewing industry and the economics of the brewing industry.

I have also studied, as I indicated earlier, the economics of the synthetic rubber industry, and most recently I have been concerned with the problems of industrial organization in the Common Market countries.

[376] Q. Did you at any time have any connection with the Johns Hopkins Operations Research Office?

A. Yes. I spent both—a couple of summers, as well as parttime consulting activity when I was—while I was a graduate student working for the Johns Hopkins Operations Research Office as an analyst. I have also had some experience working at the Census Bureau during that same period.

Q. What work were you doing for the Census Bureau?

A. I was working on the census of manufacturers, I believe, of 1958, helping to put together the data for the census of manufacturers.

Q. An analysis program?

A. A bit of analysis but it was more trying to put the figures together.

Q. Have you had any connection with the Midwest Research Institute?

A. Yes, I spent a year at the Midwest Research Institute as an associate analyst both—I was attached to their Operations Research Department, but the majority of my work was with their Economics Department.

Q. Are you retained as a consultant to any business concerns or have you been?

A. Yes, I have consulted with—for a period of time for [377] the Cummins Engine Company in Columbus, Indiana,—

THE COURT: I don't think I have got that name yet.

THE WITNESS: Cummins—C-u-m-m-i-n-s. They make diesel engines.

THE COURT: Diesel engines?

THE WITNESS: Yes.

A. (Continued)—and in the Indiana Bell Telephone Company. I have done work for them. And I have had a rather long association with the Irwin Management Company, which is a family-owned mutual fund.

Q. Have you done consulting work for any brewing company?

A. Yes, I did some work for Schlitz.

Q. For Schlitz?

A. For Schlitz, several years ago.

Q. Will you give me a general description of the work which you did for that company?

A. Yes, that was—The work I did for Schlitz was prior to and at the antitrust proceedings involving Schlitz and

Burgomeister and General Brewing Company. It was an economic—some comments on the economics of the national brewing market.

Q. In addition to your membership in Phi Beta Kappa are you a member of any other learned society?

A. Member of several professional organizations: the American [378] Economics Association, Econometric Society, American Statistical Association,—

THE COURT: A little slower.

A. (Continued)—Econometric Society, American Statistical Association, past President of our local chapter, a member of the American Association of University Professors, a member of the RESA—R-E-S-A—which is a mathematical society. I think that is it.

Q. Have you written any books?

A. I have written two books and one monograph—the monograph, several years ago—on research and development and Government contracting of research and development. I can't remember the exact title. And I have written a textbook on—called "An Introduction to Quantitative Business Analysis," which is a basic text that describes quantitative tools. And I have recently published a book called "Decision Making and the Theory of the Firm,"—

THE COURT: "Decision Making" and what?

THE WITNESS: "—and the Theory of the Firm."

THE COURT: "—the Theory of the—"

THE WITNESS: "—Firm." F-i-r-m.

Q. F-i-r-m?

A. Yes. —which is a combination of a vast variety of things, but basically it describes how microeconomic theory can be of assistance to management in making corporate decisions.

[379] Q. Have you also contributed to the literature by writing articles and notes and things of that kind?

A. Yes.

Q. In quantity?

A. Yes. I have written many articles. I can't recall how many.

Q. Have you contributed to literature having to do with the brewing industry?

A. Yes, I have.

Q. Can you recall some of those and tell us in general

what the thrust of the articles was or what the subject matter was?

A. Yes. I have done all the studies of brewing in conjunction—All my studies of the brewing industry have been co-authored in conjunction with my wife, who is a professional economist and who is a member and assistant professor of economics at Indiana University. The first study that we completed was published in 1965 in the "Journal of Industrial Economics." And that was an economic analysis of the brewing industry in which we analyzed the demand for beer in the United States and the supply and production conditions for beer in the United States. We subsequently wrote several other articles. One was a broad survey of the brewing industry in the United States that was written with a general audience in mind rather than an academic audience per se. And that was published in "Business Horizons" [380] which is an Indiana University publication that is comparable to the Harvard Business Review and California Management Review. And that was more of simply a discussion of what we had published in our 1965 article, as well as a discussion of work that we were currently doing and that we later published in the "Journal of Industrial Economics" in 1968, I believe.

The later study involved a study of industrial structure in the brewing industry in the United States. We attempted to describe a new approach to looking at industrial structure and attempted to analyze the trends in industrial structure in the United States brewing industry.

We followed that up with an article that recently appeared in "Applied Economics," and the more recent article in "Applied Economics" essentially covered the same ground as the previous article that I just described; the difference being that in the previous article we were interested in two different—in two things—in several things, really. But we had two side-by-side approaches that we were taking, that we didn't quite see how to link the two approaches. And the more recent article attempted to link the approaches and attempted to indicate both what sort of industrial structure was developing in the United States, as well as to explain why that industrial structure was developing.

[381] Q. How extensively have you studied the brewing industry in the United States?

A. Very, very extensively.

Q. Are you familiar with the developments in the industry over the last 20 or 30 years?

A. Yes.

Q. How familiar are you with them?

A. I think I am very familiar with the developments in the brewing industry in the United States.

Q. Tell me in general what happened in the brewing industry in the last 20 or 30 years with respect to the number of brewers in business. I am not talking about precise figures.

A. The number of brewers in the United States in the last 20 years has undergone a vast decline. I would guess —but I can't remember the exact figures—that between, say, 1946 and the present time the number of brewers has dropped from perhaps 375, or a figure in that neighborhood, to approximately 100 today, or 88. I can't remember the exact figure.

MR. CODY: I believe that has been stipulated to, your Honor.

MR. GORING: That doesn't make any difference. I am examining this witness.

Q. Based on your studies and your experience and your writings [382] do you have an opinion as to the cause of this decline?

A. Yes, I do.

Q. What is that opinion?

A. The decline in the number of brewers has been effected by the economic conditions in the industry, the nature of the brewers, the vast majority of brewers who have gone out of existence, and the inability of these particular brewers to withstand the strong competitive nature of the brewing industry.

MR. CODY: Objection, your Honor.

THE COURT: What is your objection?

MR. CODY: I would like the witness to establish a foundation for that.

THE COURT: You will have an opportunity to cross-examine. This is his opinion he is giving us now from study and research, he said.

Q. Tell me something about the brewers who have gone out of business. What size were they; what was their market area; what were the economic problems that beset them, if any?

A. I think that we have to understand something about the demand conditions in the industry before we can really talk about the brewers themselves and really appreciate the problems that were confronting the brewers.

[383] There are two essential facts about the demand for beer in the United States, particularly in the period between 1947 or—well, between 1947 and 1961. The total amount of beer sold in the United States in this 14- or 15-year period was essentially fixed; that is to say, it varied between something like 82 million barrels and 87 million barrels, varying one way or the other over the period. That represents the total sales.

Now there are two problems concerning the demand for beer. In the first place, the demand for beer is price inelastic. I will explain what I mean by price inelastic.

THE COURT: Price inelastic?

THE WITNESS: Yes, inelastic.

A. (Continued) What we mean by the price inelastic is this: that a change in the price of the product on an industry-wide basis will effect a relatively smaller change in the quantity of the product consumed. So that, for example, if a bottle of beer were reduced in price from 30 cents to 25 cents, this would be approximately a 20 percent reduction in the price of beer. But we would not get the 20 percent increase in the amount of beer sold. The amount of beer sold would be a smaller than 20 percent increase. So that is one feature of the beer market and the demand for beer.

[384] A second feature of the demand for beer is that while it is true that there is a positive relationship between income, an individual's income, and the amount of beer he drinks, it appears that this relationship began to lose a good deal of its strength during the late fifties. I would—In attempting to explain this I would presume that what happened during this period is that eventually we reached a high enough level of income, such that further increases in income simply didn't increase the demand for the product.

MR. CODY: I object to the witness's assumption. If it is opinion, fine! If it is assumption, I move it be struck.

THE COURT: We don't want any assumptions.

THE WITNESS: I was attempting to give an explanation for a phenomenon.

MR. CODY: We would expect the Court to consider an opinion, but if it is an assumption I would move to strike that part of the answer.

THE COURT: I don't know whether the witness used the word, "assumption." I didn't regard it as an assumption by him; I thought it was his opinion.

MR. CODY: Your Honor, I would like to have the answer read.

[385] (Portion of last answer read by reporter as follows:

> "In attempting to explain this I would presume that what happened during this period is that eventually we reached a high enough level of income, such that further increases in income simply didn't increase the demand for the product.")

THE COURT: I don't think we want any presumption.

MR. CODY: I am not sure what the difference between "assumption" and "presumption" is. But we object to both.

Q. Let me ask you whether the last answer you gave constitutes your opinion on this phenomenon.

A. Yes, it is just—If I sat back and I tried to explain what caused the fact that further increases in income did not effect further increases in the demand for beer, this is the explanation that occurs to me. It has nothing to do with the studies as an explanation of that.

MR. CODY: I move to strike the answer, your Honor, that portion of it.

THE COURT: I think the witness is simply telling us he finds the situation to be that an increase in income didn't effect an increase in consumption. Is that it?

THE WITNESS: Yes.

THE COURT: We will allow it to stand, if that is one [386] of the factors. If there is some evidence to the contrary, I would be happy to have it.

A. (Continued) To continue the story then: Under these

conditions the brewers in the United States were unable to find the means for extending their sales; that is to say, under these conditions with an inelastic price, inelastic demand curve, broad cuts in price are not the—are not going to achieve increased demand. And this is not to say that an individual brewer, if he cuts price, will not take the—may not take sales away from another brewer. But it is to say for the industry as a whole a price reduction across the board would not add to total industry sales.

The result of this is that in attempting to increase their individual sales the regional brewers sought to extend their marketing areas, and the national brewers sought to increase their sales.

[387] The result of this is that, as we might expect, when firms are attempting to increase their sales in a fixed market something has to give, and what gives is the weakest members of the market. In this case what gave was the smaller, inefficient brewers. I will speak about the word "efficiency" as—there are two ways of looking at the question of efficiency basically here. In my own studies I have come up with a figure that I have seen duplicated elsewhere to the effect that a 100,000-barrel brewery is the minimum size efficiency at which a brewery can expect to have a lengthy life or a life of any sort these days.

Other figures that I have seen place the figure as high as a million to two million barrels, but they are speaking about, in these very large figures, what I would call the most efficient size of brewer, that is to say, the brewers upwards of a million, two million barrels achieve lower cost and consequently higher profitability than do the smaller brewers.

Well, the effect of the demand conditions in the industry and that something had to give forced out the smaller brewers, the brewers below 100,000 in capacity and sales and brewers below 200,000 in capacity and sales.

My recollection is that of the something like 255 [388] breweries that went out of existence in the period from 19—I believe it's 1947 to 1964, of those 255 breweries 200 of those breweries were below 200,000 barrels of capacity, and something like 160 of those breweries were below 100,000 barrels of capacity. So that the raw figure of 300-and-something breweries, 200-and-something breweries have gone out of existence is somewhat misleading in that the brewer-

ies who did go out of existence were simply those breweries who were too inefficient to participate in a vigorously competitive industry with firms who are fighting for their share in the market.

Q. And those people you are just talking about were simply too weak to survive competition?

A. Yes, they were too weak to survive competition, not capable of producing enough barrels to make it financially feasible for them to keep up with technological advances in the industry; just changes in the method of packaging the product, of which there have been many in the brewing industry, costs, pressures in the industry.

Q. Do you regard mergers and acquisitions in the industry as having made any substantial contribution to this declining number?

MR. CODY: I am not sure I understand what is meant by "substantial."

[389] MR. GORING: I can't use the English language any more precisely than that.

MR. CODY: Very well. It is just that I don't understand what "substantial" is.

MR. GORING: I'm sorry.

MR. CODY: Is it possible the witness can give it in numbers? The Court might be able to decide for itself what is substantial or what isn't.

MR. GORING: I have a question pending. The witness' only job is to answer it.

A. I think that the easiest way that I can answer that question is to say that my recollection is that between, say, 1945 or 1947 and 1964, 1965, there were something in the neighborhood of 68 mergers and/or acquisitions, so that the number if 68. But the vast overwhelming majority of those acquisitions were of declining firms, smaller firms, and as far as their impact on the declining number of breweries is concerned, I don't think that this had any impact in that the vast majority of those brewers were on their way out at the time they were merged. So that the number is, I believe, 68 but the vast majority of them were on their way out at the time of the merger.

Q. In other words, in the Webster sense they were then failing companies?

[390] A. Yes.

Q. Now, the Government looks with disfavor on the decline of the number of brewers, and the word which it uses to describe them in the majority of terms is "concentration." You are familiar with that, of course?

A. Yes.

MR. SAGAT: I object to having in the record the argumentative phraseology of "concentration is purely the Government's position." And I would like to point out the courts have also used the term.

MR. CODY: Including the Supreme Court.

THE COURT: We will let the record stand as it is. If it is used by the Supreme Court it surely would be good enough for this court.

Q. What I want you to tell me now, Mr. Horowitz, is the relationship of concentration, whoever uses the term, to competition.

THE COURT: The relationship of concentration to competition?

MR. GORING: Competition.

A. As far as we knowthere is none.

THE COURT: There is none?

THE WITNESS: There is none.

[391] MR. CODY: Excuse me. I'd like to know who the "we" is in that answer.

THE COURT: I take it it is his opinion.

THE WITNESS: No. I have never seen anyplace a study relating to concentration of the concentration ratio to competition. The only theoretical study of which I am aware, attempting to relate concentration to competition as economists look upon competition, is the study, theoretical study published in February 1970 in the International Economic Review, one of the leading academic economic journals by Mr. T. R. Saving, a very well-known economist.

The construction of the study leads to the conclusion which I am almost quoting, I may be quoting verbatim, but then I am not sure that economists have too readily accepted, "economists have too readily accepted concentration as a measure, an indicator of monopoly power."

I don't think Mr. Saving was speaking of all economists. I think he was speaking about some economists. The con-

centration ratio is a measure of the relative size of the largest units in an industry, and that is all it is a measure of.

MR. CODY: My objection was directed to the use of the word "we." I was wondering if "we" is simply the witness' opinion or whether he was referring to some sort of a group study.

[392] Q. Will you enlighten Mr. Cody on that.
A. If I can hear—

MR. CODY: May we have it read back?
THE WITNESS: May I hear the answer to the question?

(The reporter read as follows: "Q. What I want you to tell me now, Mr. Horowitz, is the relationship of concentration, whoever uses the term, to competition. A. As far as we know there in none.")

MR. CODY: I wanted to know who the "we" is.
THE COURT: By "we" you mean yourself; is that it, sir?
THE WITNESS: I would include myself, and I think I'd go so far as to include—I would include all other economists if I am permitted the one liberty of having the opinion in the usage of the term "concentration is a measure of competition."
MR. CODY: Your Honor—
THE WITNESS: Let me begin again.
MR. CODY: Surely.
THE WITNESS: There have been no demonstrations anyplace that competition and concentration are related.

Q. And it is your opinion, I take it, that they are not?
A. Yes.

MR. CODY: And I would move to strike all of the former answer, your Honor, after the word "myself," where [393] the witness states that he is speaking on behalf of the economic community so to speak. I would move that that portion be stricken.
MR. GORING: That isn't a fair construction of what he has said with the explanation of his last answer.
THE COURT: You will have an opportunity to cross-examine and present evidence to the contrary if there is any—
MR. CODY: I did not hear.
THE COURT: You will have an opportunity to cross-exam-

ine the witness and present a contrary opinion if there is any.

MR. CODY: I presume I lose. I didn't hear your Honor's ruling.

THE COURT: I overruled your objection if there was an objection.

MR. GORING: You lose.

Q. Now, with respect to mergers, what class of brewers in size or designation, regional, small, large or national, what class of brewers have been in general the acquisitor?

THE COURT: Been what?

MR. GORING: The acquisitor, the acquiring company.

THE COURT: If there is a pattern.

MR. GORING: Yes, if there is a pattern.

[394] A. The only significant pattern that I can think of aside from several smaller brewers merging into one is several of the regionals have been active in the merger area.

Q. Several of the regionals you said?

A. Yes.

Q. And am I right in my thought that the regionals are not the giants in the field?

A. That is correct. the giants have been relatively quiet in the merger area though they have attempted—there have been a couple of attempts of the giants to merge, but either these were dissolved in the courts or cut short.

Q. They have grown in other fashions?

A. The giants?

Q. Yes.

A. Yes.

MR. CODY: While we are speaking of giants may we have the giants identified? I know it can be covered in cross-examination but it might be helpful now to have them identified.

THE COURT: I will leave it to Mr. Goring. You can persue it later if you wish.

Q. I use the term "giants" metaphorically, Mr. Horowitz. By that I really meant the larger people in the industry.

[395] A. Yes, I was assuming you meant the larger people in the industry, and I was personally thinking about people such as Anheuser-Busch, Schlitz, Pabst, Coors.

Q. I make the suggestion that almost everyone in the courtroom knows who the large brewers are on both that side of the room and on my side of the room.

Now, is there a pattern with respect to the characteristics of the acquired companies running through this merger business?

A. Yes. The acquired companies have been generally relatively small firms that had been suffering several years of declining sales and apparently were on their way out of business. So I don't think, I don't know whether they would be failing companies in the legal sense, but they were certainly companies that appeared to be on their way out of business.

Q. As I understand the result of what you have just told me, it means to me that the acquired company in many instances—I think you said most—would have disappeared from the competitive arena by its merger or no merger?

A. Yes.

[396] Q. (By Mr. Goring) Would you say that the competitive effect upon competition over the merger of a regional brewer with an unviable brewer would improve competition or the reverse?

Mr. Cody: Objection.

The Court: What is your objection?

Mr. Cody: The section under which this case is brought, Section 7 of the Clayton Act, does not deal with a pro competitive—

The Court: Does not what, please?

Mr. Cody: Does not deal with a merger having to affect a pro competitive or competitive affect, but simply it forbids a merger which has a substantial anti-competitive effect. The way the witness, the way the question has been put to the witness would not seem to be relevant to the case.

The Court: What do you say to that, Mr. Goring?

Mr. Goring: I suggest that if it appears that the merger that we are talking about has included competition, it can hardly damage them or lessen them. I suggest that if a merger improves competition it can hardly lessen it.

The Court: I think that's a sound statement.

Mr. Goring: And I am inquiring of the witness what the fact is with respect to that.

MR. CODY: Well, we object as to form, your Honor.

[398] THE COURT: If the witness understands the question, I think the Court does. He may answer it. The objection is overruled.

A. The merger of a healthy firm, unviable firm, could certainly increase the degree of competition in the area with a dying firm which I meant, I'm changing it to unviable, which I think was Mr. Goring's phrase.

THE COURT: Unviable would serve to increase competition.

THE WITNESS: It could serve to increase the degree of competition in the industry.

Q. Now, what do you know about the competition among brewers competing which existed with respect to beer sales in New England in the six New England states in the period between 1960 and 1965 or before, if you choose?

MR. CODY: Objection to 1965, your Honor, after the acquisition, post acquisition evidence, your Honor.

MR. GORING: Well, I'll do you a favor for this once. I'll amend it to make it the latest date, approximately July 15, 1965.

A. It's very hard to measure if not impossible to measure the degree of competition among the firms. All we can do is attempt to see whether the firms in the industry or in the market are, [398] in fact, the havens as with firms in a competitive market, and what we, behaving as we would expect firms in a competitive industry would behave, that is behaving with respect to the quality of their product, pricing behavior, their willingness to innovate and keep up with technicological changes, and on that presumably, also, perhaps we can look to the stability, I think perhaps it may be useful to look to the stability of their market shares.

THE COURT: Stability in their market shares? Shares in the market?

THE WITNESS: Yes.

THE COURT: You mean made by the competitors?

THE WITNESS: Yes, your Honor. As far as the question, as far as looking at things, I think the question of the quality of the product, I believe that, I think most people would agree, that the brewers simply attempt to produce distinctive, produce a quality beer, a beer that the public will ac-

cept. It's also clear that the brewers have necessarily and consistently been changing packaging and they are keeping up with the technicological advances in the industry. They all have done so. They have had to get, one draws the presumption because of the effect of the rivalry, I have looked at the price versus cost on the national level, and I have looked at this on the national level, simply because I did not have price [399] data, and specifically as it related to New England, but on the national level between 1946 and 1969 and the same thing would be true between 1946 and 1964, or indeed, between almost any period, adjust, therefore, the overall change that is weighted by the wholesale consumer's price index, the price of beer between 1946 and 1969, I believe, the figures hold true between 1946 and 1964. The price of beer went up by about 8.6 of a percent at a time when the costs were increasing based on the same price index adjusted figures by 8.3%, and this, the fact that prices essentially remained the same, where a cost has been rising, as further indication of the fact that the industry is behaving as we would expect a competitive industry to behave, particularly if we recall the fact that beer is a price-elastic commodity, the fact that beer is an elastic commodity means that if individual firms had it in their power to exercise any control whatsoever over price, they would attempt to secure price increases, because with a price increase in an elastic commodity, in an increase in the price, necessarily results in an increase in their total revenue. So that it is extremely significant that this price index has remained virtually unchanged since 1946.

THE COURT: I think we will take our customary recess at this point, gentlemen.

(Whereupon recess taken at 3:30.)

[400] (Court reconvened at 3:45 P.M.)

Q. (By Mr. Goring) Have your studies suggested to you or brought you to a view with respect to the stability of the National Brewers, so called, to enter and develop market as opposed to building of regional brewers to do the same thing effectively?

A. Yes.

Q. What is your view with respect to that, and by your view, I mean your opinion.

A. The nationals are in a much better position to do so

than the regionals, and have been for a couple of reasons. [One great advantage that the nationals have had is their great willingness to expand their capacity and to engage in multi-plant operation.] For example, between 1951 and 1969 total beer sales in the U.S. increased by, I believe, about 28 billion barrels, and at the same time the productive capacity of the nationals increased by 32 million barrels. In fact, the nationals by both adding to their capacity as well as by locating their plants in a very well chosen manner have been Johnny-on-the-spot to take advantage of the new beer consumer coming into the market through the period of the sixties when the baby boom of the immediate post-war period provided increased population of the beer drinking age. Nationals, of course, in addition to their capacity, have the great advantage of national recognition, which includes the advantages given to them, both by the ability to advertise in [401] the national media, as well as the advantage of selling beer in a country which has multi-people population, where a good deal of travel goes on, and somebody from New England, for example, who would be traveling out to the West Coast permanently, or otherwise, knows that he can buy Budweiser or Shlitz, Millers or Pabst in California, just as he can in Rhode Island, and that's a considerable advantage that the regionals do not enjoy.

Q. What effect does the behavior activity of the nationals in the area you speak of, what effect has that had upon the regional brewer economically?

A. In terms of their barrel sales, the regional brewers have remained reasonably constant over recent years, and well, several of them in particular associated brewing and Falstaff have suffered financially.

MR. CODY: What years is he talking about, your Honor?

THE COURT: Recent years.

MR. CODY: We object to anything after July, 1965.

THE COURT: I thought you said "55." You didn't mean to, but you did.

MR. CODY: Did I say '55? I thought I said '65. As post-acquisition evidence, your Honor.

[402] Q. The answer to your last question, break it into two parts, then. In the period preceding July 15, 1965, what have you to say on that subject?

A. In the period preceding 1965, I am not familiar with the financial details, but my comments with respect to the barrel sales would hold.

Q. Now, address yourself to the period post dating July, 1965 to date. What is your comment on that same subject?

MR. CODY: Same objection, your Honor.

THE COURT: Objection noted. Overruled.

A. They have at least associated, Associated Brewing and Falstaff, the figures which I am aware of have suffered financially. I believe that the same thing was true of Canadian brewers, as Carling, and certainly in terms of their volume sales, those have not been, those have remained either, I think those have remained constant, but those firms have not added to their sales.

Q. What comment do you have on the ability of the regional brewer—

THE COURT: You mean what opinion has he.

MR. GORING: Yes, your Honor.

Q. What opinion do you have on the ability of the regional brewer over this period of years that we are talking about, pre-'65 and post-'65, to expand their markets?

THE COURT: Prior now to July 15, 1965?

MR. GORING: And afterwards. He can break it [403] down, your Honor.

MR. CODY: Same objection, your Honor.

THE COURT: You mean as to the latter period?

MR. CODY: Yes, your Honor.

THE COURT: We have got it noted.

A. Pre-'65, this would have been certainly difficult for the regional brewers in two respects. One respect, of course, is capacity limitations, and the second respect is the distribution facilities and the distribution at work in areas in which they have previously not operated.

Q. Would you expand on that?

A. The latter part or the first part?

Q. Both as to the distribution stability.

A. I can't recall the exact capacity figures for any firms other than Falstaff. Falstaff, perhaps has been a typical one, but in 1965, Falstaff sales were 5,820,000 barrels. Falstaff's capacity at this time was approximately the same

figure. That is to say, if one adds up the capacity of Falstaff's St. Louis plant, the Fort Wayne plant, the Omaha plant, the two Texas plants, and the San Jose plant, I believe it's in California, if one adds up all these capacities, one arrives at a figure of 5,800,000 barrels. These are capacities figures given to the *research companies of America in the annual group survey in the industry.* A couple of the plants in Texas were [404] producing slightly over full capacity in the brewing industry serving this figure, as a result of which there is a slight difference between 5,800,000 and 5,820,000. The Fort Wayne brewery is producing slightly under its capacity, so that Falstaff would not have had the capacity to expand its sales, and the other brewers were, the other regions were not quite in the same position. The difference wasn't that great, and of course, the second feature is that even had the brewers had the capacity or even had they been willing to take beer out of a submarket or marketing area, this which they were currently selling in order to sell in the market in which they were not currently involved, they still would have needed the distributional network that would bring the beer to the public in addition to it, and my understanding of it is based on considerable reading of brewery industry publications, that a good distribution network is not easy to come by. There is a third feature which I did not mention, and that is even if you can produce a beer, and even if you do have a distributorship organization to get the beer to taverns and stores, you still have to convince somebody to buy the beer, and that is not necessarily going to be an easy hurdle to overcome.

Q. You said something to me about prices being elastic some time ago, and this question may be somewhat repetitive, but once again, what happened to the price of beer in the years between [405] approximately 1945 and the present time?

MR. CODY: Objection as to anything after July of 1965, your Honor. Post acquisition area.

THE COURT: Well, suppose we limit it to July of 1965. That's the situation at this point.

MR. GORING: All right I will accept the suggestion as to this question.

Q. Limit it to pre-July 15, 1965.

A. With the exception of the years between 1947 and 1954, because there was a short drop both in the price index and in the cost index, but so that the specific percentages might differ, it doesn't matter what period one considers. The price of beer weighted for by the wholesale commodity price index remained virtually unchanged: that is, between 1946 and any other year after '54.

[406] The cost index for beer increased by about 8 percent. If one replaces the idea of an index and simply uses the raw price and cost data over this same period, one discovers a relatively small increase in beer price—I am sorry. —one discovers over the '46 to any time in the latter —any time in the 1960 period, one discovers an increase in the price of beer. I can't remember the exact percentage of the increase, but the increase in the cost of the product was perhaps another 15 percent.

Q. What is true of the period following July 15, 1965?

MR. CODY: Same objection.

A. Between '65 and now?

Q. That is correct.

A. The price of beer remained the same, based on the—taking into consideration prices in the country as a whole, weighted by the wholesale commodity price index.

MR. CODY: The second ground for objection, your Honor, would be that the wintess's testimony seems to deal with the national market prices in the country as a whole, whereas actually we are concerned here with New England.

MR. GORING: You let me alone and I will get to New England.

THE COURT: We have your assurance of that. Very well.

[407] MR. GORING: I will demonstrate my good faith.

Q. What about the New England market with respect to the same thing?

A. I am sorry. I do not have individual price data. I do not have individual price data for New England.

Q. If I ask you to assume that the price behavior in New England essentially is the same sort that you have described as the national price behavior, what reading would that give you with respect to competition in the New England beer market?

MR. CODY: Objection, your Honor. It is purely conjectural.

THE COURT: We haven't any evidence in the record as to that, have we?

MR. CODY: It is—

THE COURT: I am addressing myself to Mr. Goring.

MR. GORING: We do not have any evidence in the record at the moment.

THE COURT: If I have your assurance you are going to have evidence that the price remained virtually constant, that is one thing. It seems to me the objection is good absent any such evidence.

MR. GORING: Let me see if I can answer that question immediately. I think I know the answer but I am not sure I can give you the assurance without some help.

(A pause)

[408] MR. GORING: I can assure your Honor that I will produce a witness—I expect to produce him tomorrow—who will testify in support of the assumption which I ask Mr. Horowitz now to make.

May we have the question, Mrs. Archambault?

(Last question, as above, read by reporter)

THE COURT: I am going to permit Mr. Goring to ask that question and I am going to permit the witness to answer it upon Mr. Goring's assurance he will have testimony tomorrow to support that statement. If such testimony is not forthcoming, I will entertain a motion by you to strike.

MR. CODY: Very well, your Honor. If I may point out, if the witness is to compare what his opinion of national price structure is to New England, it would appear apparent to me that tomorrow's witness would have to have the same opinion of national price structure and similar expertise as of national price structure as of New England price structure in order to bolster the comparison between the two.

THE COURT: I don't know why that necessarily follows.

MR. GORING: I don't see that it follows and I will take care of that problem when it arises, if I may.

MR. CODY: Very well. The objection stands.

[409] THE COURT: Overruled subject to your making a motion to strike in the event Mr. Goring doesn't produce

the evidence he says he will. I have no doubt but that he will. If that unlikely event should occur, I will entertain your motion.

MR. GORING: Do you have the question in mind, Mr. Horowitz?

THE COURT: Suppose you let him have it again.

THE WITNESS: I understand the question.

MR. GORING: And you have it in mind?

THE WITNESS: Yes.

MR. GORING: Go ahead.

A. Assuming that price in New England has remained comparatively constant, this would be an indication of a high degree of competition and rivalry among the existing firms selling in New England.

MR. CODY: May I have that read back?

(Last answer, as above, read by reporter)

Q. Do you have an opinion on the degree of difficulty of Falstaff entering the New England market in 1960 to 1965?

A. Yes.

Q. What is that opinion?

A. I think that other than through acquisition Falstaff would have found it to be unfeasible and economically inadvisable to enter New England prior to 1965.

[410] Q. Will you give me in full the reasons that prompt you to have that opinion or that bring you to that opinion?

A. In order for Falstaff to enter New England without an acquisition—without acquiring an existing firm Falstaff would have had two options. One would be to sell from their existing breweries. The second would have been to build a brewery in New England.

With respect to their ability to sell from and produce from their existing breweries as of 1964—and forgetting for the moment the point I mentioned previously about the difficulty of distributing the beer itself and selling it to the consumer, but just in terms of their productive capacity—the nearest brewery that Falstaff had to New England was the Fort Wayne brewery which sits some 800 miles away from New England. This distance is not prohibitive in the sense that it is possible to ship beer 800 miles. The difficulty is that when one is shipping beer further than, say, 400 miles from your plant, that there is one of three possi-

bilities. Either one has to give the distributor an allowance to make up for the additional freight costs he incurs, or the dealer must take—the distributor must take a smaller profit on your beer, thereby making it disadvantageous of him to carry your beer; or, third, the beer might perhaps sell at a premium [411] price which has the disadvantage that you are selling—you are attempting to convince the consumer to buy a product at a higher price than the product he is currently buying. This, of course, would restrict your ability to sell in any particular marketing area.

But even if Falstaff had made the decision to go ahead under these circumstances, selling out of its existing plants, it couldn't have done so because, as I indicated, in 1964 the plants were already operating at full capacity and Falstaff just didn't have any place to send its beer to New England, even had it chosen to do so, other than by cutting off another marketing area.

The possibility we are left with then is the possibility of Falstaff's building a brewery in New England. And this option does not seem to be an economically feasible option. [412] Specifically, suppose that we were to assume that Falstaff built a brewery and that it took the period of three years to build a brewery. This is in line with the experience of other firms during the '60s. Suppose further that Falstaff for the first ten years of the brewery's operation operated the brewery at 85 percent of capacity. I find it a very hopeful figure in view of the difficulty in selling beer, but I try to look at it from the most hopeful standpoint.

Assume further that for the next 40 years—I will assume the brewery has a 50-year life—that Falstaff operated the brewery at 100 percent of capacity, so that essentially Falstaff would be operating the brewery at 80 percent of capacity for ten years of life and at 100 percent of capacity for the next 40 years. Under those conditions if it cost $20 a barrel to build a brewery, the price of building a moderately good quality brewery, it is a lower price than it cost Pabst to build any of its breweries and a lower price than it cost Anheuser-Busch to build any of its breweries in the '60s, it is likely higher priced than the price it cost Schlitz to build its most recent breweries. But in the case of Schlitz, the two breweries they constructed were four-million-barrel breweries and there are significant capi-

tal economies to building a brewery. And I think that it is a safe assumption that [413] Falstaff would not have built a four-million-barrel brewery in New England. So that I think $20 a barrel is a reasonable figure, if not a low figure, to look at.

Well, under these conditions if Falstaff had earned for every year of its operation of this plant over a 50-year period $1.16 per barrel profit after taxes, a figure which is the exact average of the 5-year period, 1960, 1961, 1962, 1963, and 1964, and in the course of that period the figure didn't—I believe that the figure varied between $1.12 and $1.20 per barrel, but it was a very narrow range. Under these conditions Falstaff's return on investment would have been slightly less than 6.7 percent. 6.7 percent is an inordinately low return.

In 1969 of the 40 or 50 major industries, and in 1969, being a bad year for business, the cement industry which was the lowest earner of return on net worth, the cement industry turned in the lowest figure, they turned in a figure of 6.7 percent. So that in 1964 based on these very, very optimistic figures, exceedlingly optimistic figures, and based on the assumption that all the beer can be distributed and sold, Fallstaff would have found it to be a very, very poor investment indeed.

If we go further, however, if we accept the statement attributed to Falstaff's management in the Arthur D. Little [414] report, in particular the statement that Falstaff requires a 15 percent annual return, under these conditions—

MR. CODY: That is Government Exhibit 10, your Honor.

MR. GORING: That is the exhibit number of the Arthur D. Little report.

THE WITNESS: Under these conditions, recognizing Falstaff's demands for a 15 percent return, even if Falstaff were to have the brewery constructed overnight and were to immediately sell beer at 100 percent of the brewery's capacity for a 50-year period, Falstaff would have to buy this brewery at a cost per barrel of no greater than 7.7 times the net profit per barrel at which it could sell beer.

Specifically in terms of dollar figures, what this means is that if the brewery cost Falstaff $20 a barrel, Falstaff would have to anticipate earnings in excess of 2½ dollars per barrel net profit. Such a figure has been earned by two or three breweries in particular years, years since 1965.

I believe Anheuser-Busch has topped that figure the last two years, and I think Pabst has topped that figure also and hardly may approach this. But Falstaff over the last decade has failed to earn in excess of $1.20 per barrel. [So that based on the demands of its management [415] it is unthinkable that Falstaff would have committed the error of constructing a brewery in 1964.]

Q. Now, what can you tell us, and I am asking for your opinion based on your knowledge, of the industry and New England activity in it, what can you tell us as to the difficulty of acquiring a distribution system other than by acquisition?

Mr. Sagat: Your Honor, I'd like to object to that question on the ground that I don't believe it is in line with the qualifications of Dr. Horowitz. As I understand, Dr. Horowitz was placed on the stand as an economist with an academic background in economics and a particular expertise in mathematics.

I fail to see how something in the area of marketing which might be more in the line of expertise of an advertising executive or perhaps the marketing vice-president of a particular company including Falstaff, I fail to see how that type of inquiry regarding distribution would fit within the scope of Dr. Horowitz' qualifications.

The Court: What do you say to that, Mr. Goring?

Mr. Goring: I think his qualifications to testify in this area are surprisingly high.

The Court: Limiting yourself to the question related to the difficulties of establishing a distribution system. [416]

Mr. Goring: In the brewing industry in New England. His studies in the brewing industry have been extensive. I didn't ask him whether his studies in the industry got him into this field, but they are extensive enough so I can hardly perceive that he didn't.

The Court: Let us be specific and ask him if he made any studies in the particular field.

Q. To what extent have you familiarized yourself or made studies which have anything to do with the distribution as distinguished from the production of beer and its importance in the economy of a brewery?

A. I will answer that question in two parts if I may, the second part first. Distributing beer and the acquisition of

distributorships and having distributorships available to you is clearly of extraordinary importance in the brewing industry.

Q. Your experience and your studies are such that you think you are entitled and qualified to express an opinion on that point?

A. I think that my extensive reading of operations in the brewing industry and in particular my reading of the material of people who have studied this particular aspect of the industry makes me say that with confidence. I myself have not studied distribution networds, but I [417] of course have read very carefully the material of the poeple who have.

Q. You are familiar with literature which dealt with that subject?

A. Yes.

Q. You are familiar with the qualifications of people who contributed to that literature?

A. Yes.

Q. And, as a matter of fact, Mr. Horowitz, isn't that one of the methods in which you studied this industry?

A. With that specific type of background knowledge, yes.

Mr. Goring: Now I submit the prior question subject to objection and your Honor's ruling.

Mr. Sagat: Your Honor, May I make a statement in this regard?

The Court: Yes.

Mr. Sagat: In the first place, I don't see how Dr. Horowitz can pass on his own qualifications. Secondly, it seems to me now Mr. Goring is trying to qualify Dr. Horowitz not as an economist but as a brewing-industry expert.

I submit that on the one hand it doesn't appear that Mr. Horowitz has ever in fact worked in the industry, worked for a brewing company. Secondly, Dr. Horowitz [418] hasn't stated what literature he has read, and I fail to see exactly how particular specific facts regarding distribution would be within the realm of the particular intellectual knowledge of an economist as compared to a layman in this respect.

I think that a lawyer could read literature regarding the brewing industry and restate and say distribution is important and then state in a court that he believes that distribution is important.

THE COURT: We have had considerable testimony already in this case, have we not, dealing with the necessity of viable distribution organizations, the necessity of having one. It is already in the record.

MR. SAGAT: Yes, but the question I objected to was with respect to a brewer in particular, and I don't recall the question exactly in the past five minutes. I believe it was with reference to Falstaff, if Falstaff could secure distribution. Mr. Horowitz has stated he has read distribution is important, but I am objecting to his qualifications in regard to how he can determine if Falstaff could secure distribution in fact.

In short, the Government contends Dr. Horowitz is not an expert on the particular subject of whether Falstaff could in fact secure distribution.

[419] THE COURT: You mean in the New England area?

MR. SAGAT: In the New England area.

THE COURT: I don't mean any criticism of the qualifications of the witness in his field. I think undoubtedly his qualifications are most substantial, but with respect to this particular inquiry, Mr. Goring, is Mr. Horowitz proposing to do any more than tell us what some other authority on the subject, some other writer, a writer on the subject has said in the literature?

Now, I am not prepared to say what some other individual may write or say would necessarily by the opinion of this witness. I don't know that it is a proper basis on which to predicate an opinion, the writings of someone else. Isn't that about what we are getting down to here?

MR. GORING: When you are dealing with an economist, professor, I don't think it's 100 percent accurate, but I will bow to what I see is your ruling at the moment.

THE COURT: I have only one desire in this case: to be fair to both sides and reach the correct result.

MR. GORING: Let me ask another question. It might not even have a taint of inadmissibility.

Q. Can you tell me how important it is to be able to distribute products?

A. If you can't distribute your products—

[420] THE COURT: At a profit.

THE WITNESS: At a profit or not, if you can't distribute

your product, you can't sell it even when people want to buy it.

THE COURT: I think that goes without contradiction. We will stop here until 9:00 o'clock tomorrow morning.

(Court adjourned at 4:30 p.m.)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA
*v.*
FALSTAFF BREWING CORPORATION } C.A. No. 3523

Before his Honor, Chief Judge Day

Friday, October 9, 1970

APPEARANCES:

For the Government: Philip F. Cody, Esq.
Bruce Repetto, Esq.
Kenneth A. Sagat, Esq.
Department of Justice
Antitrust Division

For the Defendant: Hinckley, Allen, Salisbury & Parsons; Matthew W. Goring, Esq. of counsel
Jerome M. McLaughlin, Esq.
St. Louis, Missouri

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*FOURTH DAY*

*FRIDAY, OCTOBER 9, 1970*
*10:00 A.M.*

THE COURT: Go right ahead, Mr. Goring.

IRA HOROWITZ, Resumed

DIRECT EXAMINATION BY MR. GORING

Q. Mr. Horowitz, do you know what has happened in the New England market since 1965 with respect to the market shares of the various brewers?

A. Yes.

Q. Will you tell us, please, what has happened?

A. Basically, what has happened is that the nationals have increased their share of the market considerably—in particular, Anheuser-Busch and Schlitz—and the other interesting feature of market shares is that if one considers the shares of the leading firms at the beginning of such a period, the shares of the leading firms have tended to either decline or remain the same over the period. That is, lumped together, the shares of each individual firm may have varied up—some have gone up and some have gone down. But if we take the four leaders, say, at the beginning of the period that you mentioned, these shares would have either stayed the same or declined, either on a state-by-state basis or in New England as a whole.

[424] The same phenomenon exists if we consider the shares of the leading four firms by state in New England as of 1955 and we consider what has happened to the shares of those leaders since 1955. In Rhode Island and in Connecticut the shares of the leading four firms in 1955 are somewhat less, I believe,—I think I might say substantially less—than they were in 1955. And as far as the other four states are concerned, I don't have figures—I don't recall seeing figures on New Hampshire, but as far as Massachusetts, Maine, and Vermont are concerned the shares of those leaders in 1955—more or less are at the same level now as they were then.

Q. You are talking about 1965 and following?

A. I was talking about 1955 to now, but it would also be true, I believe, as of—from 1965 to now.

Mr. Cody: Your Honor, may we note our same objection on the grounds of post-acquisition evidence to the extent that this witness covered the period from July 1965 to the present?

The Court: Certainly. Objection is noted.

Q. Can you tell me whether the New England behavior that you have just been talking about is reflected or not in the national picture?

A. The national picture is slightly different, only to the [425] extent that again the nationals and, in particular, Schlitz and Anheuser-Busch, have increased their share of the market considerably.

But if one were to consider the firms other than the nationals and consider what has happened—the leading firms in the industry and consider what has happened to their market share and their sales, one finds that there are individual firms that have improved from year to year, as we would expect would happen in a competitive industry. There are individual firms whose sales have not declined. For example, I believe that Schaefer is now—would be considered to be a large firm. It has been doing quite well recently. I think that over the past decade it has increased its barrelage by something like 2 million barrels. But, by the same token, Ballantine which in 1960 would have appeared to be in a firm position as one of the leaders, firm leaders, in the industry, has lost about 2 million barrels in sales.

MR. CODY: Same objection.

THE COURT: Objection noted.

Q. When you speak of the four leading firms, as you did in answer to my earliest questions, which firms do you mean?

A. I don't recall the specific—I don't recall the specific names of the firms. And if you have reference to the four [426] leading firms in 1964 and 1965, that would depend both on the individual states. Or if you are speaking about New England as a whole—

Q. I am speaking about New England as a whole.

A. (Continued)—I would have to see the table. I don't recall the names of the four leaders.

MR. CODY: May we also have the year, your Honor?

MR. GORING: Yes, I will fix that for you.

Q. I am showing you copies of Defendant's Exhibits G and H, which are graphic representations,—

MR. GORING: Does your Honor have a copy of it?

THE COURT: I do.

MR. GORING: Whereas I suggested to the Clerk yesterday I was lending them to you, I am now presenting them to you for your personal files.

THE COURT: Thank you.

Q. Will you comment on those graphs in the light of what you said? And when you do, tell us of what years you are speaking. And you may separate the period before July 15, 1965 and the period afterwards, if you will.

Mr. Cody: Your Honor, to simplify this may we have an objection to the question now before the answer is read?

The Court: On the ground it is post-acquisition?

Mr. Cody: On the ground it is post-acquisition.

[427] The Court: Very well. Certainly.

A. The four leading firms in the New England marketing area in 1964 were Narragansett, Rheingold, Anheuser-Busch, and Schaefer Brewing. The two leading firms in the market were Narragansett and Rheingold, and both of those leaders suffered losses in barrelage, which I would have to estimate. From the graph it appears that Narragansett lost more barrelage over this period, about—I guess it is about 200—must be about 190,000 barrels, if I read the graph correctly.

[428 Rheingold appears to have lost about 400,000 barrels. The most striking thing about the graph of course is Anheuser-Busch which, as I indicated previously, does in fact account for the increases in concentration and ratio in the New England area as indeed it is the primary contributor to the trend in the U.S. and national concentration of ratio of course. Anheuser-Busch almost tripled their barrels from adding to the total of one million—what appears to be about a little less than 1,200,000 barrels.

Q. Now, the other graph which is Defendant's Exhibit G deals with the national picture. Will you comment on that.

A. Yes. This shows the same—this shows the phenomenen I was just speaking about, but it only shows it in part in the sense that I believe it presents the ten—well, I'm not sure which ten brewers these are, but I think these may well be the ten leading brewers as of 1969 rather than the ten leading brewers as of 1960.

If we had the ten leading brewers as of 1960 I know there would be a different composition of firms, so that some of the firms that were among the leaders—I know at least one, Ballentine here, and there may be others as well, that were among the leaders in 1960 are no longer there in 1969. But this particular chart again emphasizes the rather impressive growth of the nationals, [429] Anheuser-Busch, Schlitz, Pabst and Miller, and it reflects the peeking-out or the constancy of the regionals such as Falstaff, Carling and Hamms which has more or lass maintained constant barrelage over this period.

Q. Do you have an opinion as to what causes the surprising increases in barrelage in firms such as Anheuser-Busch, Schlitz and Pabst.

MR. CODY: Objection, your Honor. I don't think whether an increase is surprising or not—

THE COURT: What is that please?

MR. CODY: I object to counsel's question about a surprising increase.

MR. GORING: I will remove the word "surprising," if that will suit you better.

THE COURT: It might well not have been surprising. I will allow him to answer the question.

A. Again, as I suggested yesterday, although beer sales, total beer consumption in the United States remained fairly constant between the mid-40s and the decade including the decade of the '50s.

There have been very large increases in sales during the past decade starting really in the early '60s, and the nationals have taken advantage of this increase [430] in sales by building additional plants, thereby obtaining significant additional capacity. And they have been very clever in the location of these plants in that they have placed the plants in the dynamic growing areas, population areas of the United States such as the west coast, the new beer market of the south which is really developing into a strong beer market, and the southwest.

So that I cannot remember the exact year—Oh, yes, as a matter of fact, I can remember the exact year. Between 1951 and 1969 total beer sales in the United States increased by 28,000,000 barrels, and the nationals increased their capacity during this same period by 32,000,000 barrels, so that the nationals have been there with both capacity and the capacity in the right places to take advantage of the addition to the beer-consuming population. And I believe that plus advantageous marketing position of being nationals has helped them to attain this large growth.

Q. Now, the testimony in this case includes testimony that these graphs delineate among other things the competitive situation between firms in the national and in New England separately so far as barrel sales are concerned. Is there any relation or what is the relation if there is any between this market behavior which is reflected in these

[431] graphs and the merger between Falstaff and Narragansett or the acquisition by Falstaff of Narragansett?

MR. SAGAT: Objection, your Honor. I don't see how market behavior is reflected in this graph. I think that is a conclusionary statement.

THE COURT: What's that again?

MR. SAGAT: Your Honor, I don't see how either a competitive situation or market behavior in particular is reflected in these graphs. I believe that Mr. Goring is making a conclusionary statement.

MR CODY: Perhaps Mr. Goring would care to ask the witness if market behavior is reflected in these graphs in his professional opinion.

MR. GORING: Perhaps I would not, but I would like my question read again so you may reflect on what you have said.

THE COURT: Read the question.

(The pending question was read.)

THE COURT: By "market behavior" do you mean the competitive situation?

MR. GORING: I mean the market behavior which these graphs reflect which really means nothing more than barrel sales of these various companies; (a) in the New England area alone, and (b) in the United States, talking about market behavior to the extent that it is reflected in these graphs.

[432] MR. SAGAT: Your Honor, I agree that the graphs reflect barrel sales.

THE COURT: The competitive situation?

MR. SAGAT: No, I don't agree with Mr. Goring's conclustion that the graphs reflect the competitive situation or market behavior.

THE COURT: Don't they reflect the competitive standing of relative sales in the various companies?

MR. SAGAT: What these graphs reflect is the barrel sales of these companies, in the year indicated.

THE COURT: Correct. That would mean the reflective sales of each of the companies, their respective portions of the market.

MR. SAGAT: Yes, your Honor, but the witness has not testified previously and contrary I believe to what Mr. Goring has just stated, that the graphs reflect the competitive situ-

ation in the market. Indeed, the witness testified at page 100 in the trial record of this case: "It is very hard to measure, if not impossible to measure, the degree of competition among the firms."

THE COURT: I don't know what is meant by that, frankly, the degree of competition between the firms. I don't see what that indicates.

MR. SAGAT: Your Honor, the graphs do not reflect in [433] and of themselves the degree of competition in the market.

THE COURT: They certainly reflect the sales of the respective participants in the market over a particular period; do they not?

MR. SAGAT: The Government contends they do not reflect competition in the market.

[434] THE COURT: What does the Government mean by that: They don't reflect competition in the market?

MR. SAGAT: The Government has no objection to Mr. Goring asking his witness what the witness thinks competition in the market means. But for Mr. Goring to make the statement that these graphs reflect competition, I believe, is conclusory.

THE COURT: What do you say to that, Mr. Goring?

MR. GORING: I am afraid counsel for the Government still doesn't listen to the question that I asked, even when I asked it or when it was read. And I assure your Honor this witness will be the first person in the courtroom to contradict me if any premise in that question is wrong.

To the extent that these graphs show the barrel sales of these several brewers (a) in the New England market, (b) in the nation, they reflect at least a facet or two of the competitive picture. And that is all I am asking for.

MR. CODY: With that understanding, your Honor, the answer is acceptable.

MR. GORING: That isn't an understanding. That is a statement of what my question means, and the question itself reflects it.

[435] MR. CODY: Our only objection was that charts do not show the broad area of market behavior and competition. They show standing and sales.

MR. GORING: There is nothing in my question that suggests they show everything about competition.

THE COURT: Are we agreed upon the form of the question that is pending or has it been revised?

MR. GORING: Perhaps it should be read again.

(Last question read by reporter as follows: "Now, the testimony in this case includes testimony that these graphs delineate among other things the competitive situation between firms in the national and in New England separately so far as barrel sales are concerned.* * * ")

MR. GORING: "So far as barrel sales are concerned." Continue.

(Reading of last question resumed by reporter as follows: "Is there any relation or what is the relation if there is any between this market behavior which is reflected in these graphs and the merger between [436] Falstaff and Narragansett or the acquisition by Falstaff of Narragansett?")

MR. SAGAT: Your Honor, the Government is objecting to the change of language, I believe, in the second sentence of Mr. Goring's question. The first sentence was satisfactory, I suppose, when Mr. Goring says, "The competitive situation as reflected in barrel sales." In the second sentence of the question the statement regarding the competitive situation then, I believe, states in so many words "in respect to market behavior." And with regard to market behavior the Government contends that market behavior can mean the particular policies of each company in the market, something which graphs cannot show.

MR. GORING: The Government still will not listen to that question because my question relates—and its text discloses it relates—to this particular market behavior which is shown in the graph.

THE COURT: The competitive situation.

MR. GORING: With respect to this particular situation.

MR. SAGAT: Your Honor, if Mr. Goring by "market behavior" means the barrel sales of these companies on this graph, then the Government withdraws its objection.

MR. GORING. I think the Government finally understands.

MR. CODY: I think we all understand.

[437] THE COURT: Very Well. With that understanding let's proceed.

MR. GORING: I am glad that has happened.

THE COURT: Now can you answer the question, sir?

A. Yes.

MR. GORING (To defense counsel) Have you any further suggestions for me on that subject?

Q. Now with your familiarity with the brewing industry, both nationally and in the New England states—I am addressing myself now particularly to the New England states—do you have an opinion as to whether there was a means by which Falstaff could enter the new England market other than by the acquisition which is in dispute here?

MR. CODY: Objection, your Honor.

MR. GORING: The answer to that question is yes or no and should be harmless to you.

THE COURT: He may have an opinion, Mr. Cody. But whether he be permitted to give it is something else again.

MR. CODY. I believe, your Honor, that—very well.

A. Yes.

Q. What is that opinion?

MR. CODY. Objection.

THE COURT: What is your objection?

MR. CODY: I believe, your Honor, the witness has been [438] qualified as an economist who has studied various trends in the brewing industry, various states and throughout the nation. It was brought up yesterday afternoon by Mr. Sagat that Mr. Horowitz is not a marketing expert. He is not an engineer familiar with building a brewery. He is not familiar with the basic elements of distributorship problems. I see nothing in Mr. Horowitz' most impressive qualifications as an economist that qualifies him to answer that question.

THE COURT: What do you say to that?

MR. GORING: With the utmost respect I disagree. I think the record shows the experience and qualifications of this witness to testify on this subject.

THE COURT: He certainly hasn't had any experience, has he, in building a brewery or operaing a brewery or even working in the brewing industry in any phase of it?

MR. GORING: I don't know any economic professor who has had that special experience. There may be some, but one does not need to have been a brewer's apprentice or to have worked in a brewery, or be an officer of a brewing

company to analyze market situations. That is in the province of any sophisticated, well-educated economist. And his qualifications in that field alone, coupled with his special knowledge of the brewing industry, entitle him [439] to express an opinion on this subject.

THE COURT: Any determination of the propriety or of the wisdom of following a particular means of entry into a market would involve, would it not, considerations of the costs, the obligations to be incurred preliminary to making such an entry by a particular method?

MR. GORING: My question has nothing to do with the propriety or the wisdom—

THE COURT: What was the question?

MR. GORING: —of corporate activity. My question has to do with the economic realities of entering into the New England Market.

THE COURT: Why doesn't that involve the elements of costs, outlays, in one particular form of entry as against another?

MR. GORING: It does; it does. It involves, among other things, the economic feasibility of entering by building a brewery.—

THE COURT: Exactly.

MR. GORING:—in respect of which this witness has testified to some extent earlier. I have no reservation in saying that his qualifications as an economist particularly knowledgeable in this field fully warranted him in telling us it was unfeasible for Falstaff to come [440] in here and build a brewery. Now this question is in the same economic area. It is not a question of the wisdom of corporate people in doing this. It is not a question of the legality of propriety of this action. It is a question of the economic facts.

THE COURT: There is no jury here, gentlemen. I will take the position the objection goes to the weight to be accorded to any testimony the witness may give in this regard rather than its admissibility. The Government's objection to the proffered proof is denied.

MR. GORING: Do you have the question in mind, Mr. Horowitz, or shall I have it read? It has been several minutes since it was asked.

THE WITNESS: I think I have it in mind.

MR. GORING: Very well.

THE COURT: What is your answer?

A. Coming into the New England market by building a brewery here is analogous to any other investment. It is an investment in a plant. And in analyzing the investment in a plant we must consider several factors, including the cost of building that plant, the revenues that we expect that plant to generate, the time at which those revenues will be generated, and the return that we demand from that investment. There are also, of course, questions [441] of risk and our certainty or uncertainty with respect to the various revenues we might be anticipating.

And as I indicated yesterday, under the best of circumstances, making very optimistic assumptions about revenues and very optimistic assumptions about selling our beer in these breweries; that is to say, making the assumption that we would sell every bottle of beer that we could brew in that brewery, and making the assumption that the brewery to be built is a brewery in excess of 1 million barrels of capacity—an assumption that is not terribly important, but I make it only because this is in line with the other nine breweries that have been built since 1960 in the United States—all have been in excess of 1 million barrels except for the Carling brewery in Texas, which was a 300,000-barrel brewery, but it failed literally immediately; and when it was taken over by Miller and reopened, it wasn't reopened until it was expanded to a 1 million-barrel brewery.

Making this assumption and also making the assumption we would have more than a 1 million-barrel brewery—it might be 2 but it certainly wouldn't be 4—that the lower limit to build such a brewery based on the figures for building the other nine breweries in the United States since 1960 was $20 a barrel, that is the cheapest dollar-[442] per-barrel brewery built in the United States since 1960 other than the two Schlitz breweries which were over 4 million barrels. And if we make these optimistic assumptions about low costs, high revenues, and if we recognize Falstaff's demand for return on investments of—15 percent return on investment, as I indicated yesterday, would require a greater than 2½ dollar per barrel profit and a minimum of approximately 6½ percent return on investment, which is, of course, extraordinarily low, one could do better by putting the money in a bond or a good savings and loan—well, not—a bond.

Even then Falstaff would have to anticipate a higher revenue per barrel than it earned in the period between 1960 and 1964 in order to justify building a brewery. And that was under the most optimistic of circumstances.

But if we take a look at the total sales of beer in New England—I believe 1969 beer sales were approximately 7 million barrels—one can forecast sales by 1980 of approximately 9 million barrels in New England, which means a 2 million barrel increase to go to New England. And Ballantine by itself has 2 million barrels of excess capacity at the present time and has had for several years. Anheuser-Busch, of course, is building—has built a new brewery in Merrimac, New Hampshire. I am not sure of the [443] exact size of that brewery. But Falstaff could not have anticipated walking in and simply capturing the new consumers because there weren't that many to capture and there were—there are other firms with the capacity to capture them. And, instead, they would have had to not only make this investment which under the most optimistic of circumstances is a highly dangerous one economically, but they would have actually had to put on, I would presume, a vicious fight, competitive fight to meet these goals even halfway. And I suspect they couldn't have done that.

So that I— my judgment is it would have been a serious error for Falstaff to have built a brewery and entered the New England market by building a brewery in 1964.

Q. Calling your attention to Defendant's Exhibit H and directing your particular attention to the market behavior of Narragansett since 1965 to the extent the graph shows it, can you account for the decline in Narragansett barrelage?

Mr. Cody: Once again we object to the term, "market behavior," your Honor.

The Court: I appreciate it. Objection noted, overruled. What was the decline in barrelage? Does it appear?

[444] The Witness: About 200,000 barrels, I believe.

The Court: About 200,000?

The Witness: Yes. It looks like about 190,000 barrels, as I read the graph.

A. I think that it is fairly clear from the graph that Narragansett was losing customers and sales to the nationals and, in particular, to Anheuser-Busch and Schlitz.

MR. CODY: Objection, your Honor.

THE COURT: What is the objection?

MR. CODY: If your Honor will examine the graph—

THE COURT: We are talking about Exhibit H?

MR. CODY: Yes, sir; Defendant's Exhibit H.

It simply shows that some sales are going up and Narragansett is going down. It shows no relationship and no reason whatsoever for the decline in Narragansett sales. It simply shows a decline in sales to a degree and it shows increases in sales of other firms. How there is any causal relationship established by this graph is quite beyond my comprehension.

MR. GORING: I did not ask the graph a question. I asked the witness a question.

MR. CODY: Based on the graph.

[445] THE COURT: Well, let's have the question read back.

(Question read back.)

THE COURT: Objection is taken to the answer, is that it?

MR. CODY: To the question, your Honor. There is no answer.

THE COURT: No answer, and you object to the question?

MR. CODY: Yes.

THE COURT: I'll allow the question. It may be answered.

THE WITNESS: May I have the question again, please?

(Question read back.)

THE COURT: You may answer.

A. If I am restricted to reaching judgment solely on the basis of the graph, I can only comment that Narragansett has lost sales, about 190,000 barrels of sales, and that Anheuser-Busch and Shlitz have gained sales. That's the only comment I can make on the basis of the graph, but I have performed an analysis of the data that underlines the graphs that have been—that have enabled me to reach certain conclusions.

Q. My question goes beyond the graph. My question wasn't intended [446] to restrict you to the graph, but merely to call your attention to the decline in sales shown on the graph and ask you whether you have an opinion based on all your experience as to why that occurred.

A. Yes, I do.

Q. Will you give it to us, please?

A. Yes. There has been a persistent tendency, persistent in each one of the new England states individually, since based on data since 1955 for customers of Narragansett to switch to the national beers.

Q. Do you have an opinion as to whether this decline in Narragansett sales since July 15, 1965 was affected at all by the acquisition by Falstaff or Narragansett? That is a question which you may answer yes or no. Do you have an opinion?

A. May I hear the exact question again?

(Question read back.)

MR. CODY: Objection. Post-acquisition evidence, your Honor.

THE COURT: I understand. The objection is overruled. You may give us your opinion.

A. In my judgment Falstaff's acquisition of Narragansett did not promote the decline in Narragansett sales. One would hope that Falstaff's management was sufficiently able, such that the acquisition of Narragansett by Falstaff helped to defer or helped [447] to deter what might have been a greater decline.

Q. Having in mind the fact that Falstaff prior to the acquisition had no significant sales closer to New England on the south than Washington, D.C. and Richmond, Virginia, and closer on the west than the State of Ohio. Having that in mind, do you have an opinion as to whether Falstaff's presence in Ohio and in the Washington-Richmond area would have any significant affect upon the competition in New England?

A. Yes.

Q. What is that opinion?

A. I think it would. I think it would have had no effect.

THE COURT: No effect?

THE WITNESS: No effect.

Q. Were there other regional brewers selling in areas near New England who might have had aspirations to enter the New England market?

MR. CODY: Objection, your Honor. The question calls for the witness to testify as to aspirations of some other brewers.

THE COURT: I don't know, Mr. Goring, whether that calls for conjecture on the part of the witness. I think perhaps it does.

MR. GORING: Perhaps it is marginal. I will rephrase it, your Honor.

[448] Q. Were there other brewers in areas reasonably contiguous to New England in the regional brewers' class?

A. Yes.

Q. Can you name them for us? Can you name some of them for us?

A. National brewers?

Q. National brewers.

A. May I ask a clarification? Do you mean as close to New England as Falstaff?

Q. Closer.

A. Or closer.

MR. CODY: May we have a location on these, too, your Honor?

MR. GORING: The witness will be glad to oblige you.

A. National sales will certainly in Washington and Baltimore, that area, and I'm not sure how far north they go, but I think they are selling National Bohemian down there. They brew several beers. Genesee would not, I don't think Genesee would classify under the title of a regional brewer, but it sells close to 2,000,000 barrels a year, so that it's in size, by size it's not quite local by size, if we are defining regional by size, I think Genesee would qualify. They are in Rochester, New York. The Strohs Brewery in Detroit established themselves, Strohs Beer in I don't know how many states in the midwest, but in [449] several, they sell in my own Indiana, and they sell in Ohio, and in Michigan. The Brewery in Philadelphia, which has been spreading very, very widely to large breweries in Pittsburg, the Pittsburg Company and the Duchesne Brewery. I can't remember the names and their particular brands, but Duchesne, which has a 200—2,000 barrel capacity brewery, but it's selling only about a million barrels a year. Now, they have shown a willingness to expand their areas by moving into Ohio.

THE COURT: You said, "2,000." You meant 2,000,000 capacity?

THE WITNESS: I meant 2,000,000. I'm sorry. Those are the ones that occur to me offhand.

Q. Do you know how many breweries which were in existence a few years ago in New England—

THE COURT: A few years ago?

MR. GORING: A few years ago, your Honor.

THE COURT: Meaning how long?

MR. GORING: Well, I am going to let the witness tell me that, your Honor.

Q. Do you know what breweries in New England a few years ago are not now in business, and can you tell me when they went out of business and how it occurred?

A. I can't tell you how, but I think I can answer the other part of the question.

[450] Q. Do the best you can.

A. Yes. Between 1958, no, really, 1956 and 1963 and 4, I believe there were four breweries that disappeared in New England. Two of the breweries were in Massachusetts. Those were the Enterprise Brewery, I think it was, I think it was called Enterprise, and the Worcester Brewery.

Q. Which?

A. Worcester. Their capacity of, I believe one had a capacity of about 175,000 barrels and the other had a 100,000 barrel capacity, but their production prior to going out was much below that, and those breweries very simply disappeared, have gone out of existence, and in the period between '58 and '63 or 4, the Hanley Brewery in Rhode Island was, I presume, shut down by Narragansett. That is, it had disappeared and Narragansett owned it, so I think it was a small brewery of a 200,000 barrel capacity. I see that Narragansett owned it and must have felt it was uneconomical to operate that brewery. And the fourth brewery that disappeared was Cremo in Connecticut, which, I believe, also was approximately a 100,000 barrel brewery. That also just disappeared.

Q. Some time ago, Mr. Horowitz, the Government and Falstaff agreed that this was an accurate statement of fact and that agreement was for the purpose of this particular record, so it is part of this record. Now, I will read it to you in its exact text. [451] It is Paragraph 13 of Exhibit 1, gentlemen. "Per capita consumption in the United States increased from 10.3 gallons, this is per capita, so this is not

in millions or thousands, 10.3 gallons in 1935, 15.6 gallons in 1964." Do you have any comment on the significance of those facts?

A. I think that that is a very misleading pairing of notes. If one looks at the entire stream of per capita consumption statistics, I think per capita consumption of entire per capita based on the population as a whole, or per capita based on the population of beer drinking at an age, I'm not quite sure how that's defined by the Brewers' Almanac that puts it out, but it's between 18 and something. If one looks at these figures and considers per capita consumption, I'm not sure how late after 35, but it would certainly be per capita consumption as of the early forties there is a steady persistent decline in per capita consumption of beer from the early forties to the early sixties, and I may be in error, but I believe that there may have been a slight upturning or a slight leveling off within the last years, but up to that period you mentioned, there would be a persistent decline.

[452] THE COURT: In other words, am I to understand that stipulation is inaccurate according to the witness?

MR. GORIN: No, the witness doesn't say that.

THE COURT: Well, what does he say? The stipulation was to the effect per capital consumption increased from 10.3 gallons in 1935 to 15.6 in 1964.

Q. Clarify that for the Court.

A. The years selected at the beginning and ending years are very misleading because per capita consumption went up, perhaps it was immediately following 1936, perhaps it was within the next five years. But in the early 1940s per capita consumption was, I would guess, twice that of 1935. That is, by the early 1940s my—

MR. SAGAT: Objection. The witness is guessing.

MR. GORING: Let him complete his answer.

THE WITNESS: My recollection is that by the early 1940s per capital consumption of beer was perhaps 20—is it gallons, whatever the unit is—perhaps 20 gallons per person, but it was certainly by the early '40s much above 15 gallons per person which was the 1964 figure that you quote.

MR. CODY: I understand the defendants do not dispute that in 1935 consumption was 10.3 gallons and in 1956 it was 15.6 gallons.

[453] THE COURT: 1956?

MR. CODY: 1964, excuse me.

THE COURT: In 1964 it was what again, 15.6?

MR. CODY: 15.6 gallons, your Honor.

MR. GORING: I certainly do not dispute that those figures are factual and the years with which they are identified are correct. If I had any such reservation I would not have agreed with you upon this.

THE COURT: What are you now trying to do?

MR. GORING: What I am now trying to do is to find out whether it has any significance.

Q. 1935 was not long after the repeal of prohibition; was it?

A. No, it was not.

Q. At that time were breweries producing beer in quantities that they were producing in 1964?

A. Certainly not.

Q. Would you agree with me if I suggest that the per capita consumption of beer in 1935 had a strong relation to the amount of beer which was available?

A. I would certainly agree with that suggestion.

Q. And do you see any significance in the fact that per capita consumption in 1935 was 10.3 gallons and in 1964 it was 15.6? Do you see any significance in that?

A. I do not.

[453] Q. You and I have discussed while you have been on the stand, Mr. Horowitz, data with respect to matters which have occurred since July 15, 1965, with respect to the effect upon competition of this merger or acquisition. Do you have an opinion as to whether postacquisition information is of value?

A. Yes.

Q. What is that opinion?

A. I feel that it should be given serious weight.

Q. Will you amplify that.

A. Yes. I think that as a statistician as well as an economist I always form probablistic judgments about things. There are very few things with certainly. Some of my probability judgments are stronger than others, but what I attempt to do is to form judgments and then I proceed to revise and modify these judgments as additional information comes in.

In terms of the particular data to which you refer and

the particular question of the competitive effects of the merger, I think that what I personally do and what I think other statisticians would do would be to form their judgment if they are speaking about probable effect, and then to revise those judgments by taking into consideration the new information that we have, that is, [455] what has actually happened since the merger.

Q. You think then, I take it, that what has actually occurred is a better guide than going back to 1965 and looking through a crystal ball?

MR. SAGAT: Objection. On this question and the previous question Mr. Goring is asking the witness to testify to a legal conclusion. The admissibility or weight of postacquisition evidence in a judicial proceeding—

MR. GORING: I am not.

MR. CODY: That is outlined in our brief, your Honor.

THE COURT: I appreciate that whether the Court shall give any consideration to postmerger evidence as determined in the issues under the Clayton Act is for the Court to decide.

MR. CODY: Correct. I would think it is one thing for an economist and statistician in performing his own particular job to consider both sides of an acquisition in order to reach some statistical result. However, I think the Supreme Court, the District Courts, have spoken as to how an attorney in a court must approach the same issue. It is not necessarily the same.

MR. GORING: I must assure the Court and the Government as well that I have not asked Mr. Horowitz to put on judicial robes. I have asked him to answer [456] this question as an economist.

THE COURT: I will allow it for what it's worth.

MR. GORING: Would you read the question.

THE COURT: The Court is bound by what the case law is in this regard.

MR. GORING: And so am I.

THE COURT: I think so, but if you want to get into opinion confirmation by the economist of his opinion by postjudgment development, if that is what an economist does, I will allow him to testify.

MR. GORING: Read the question please.

(The question was read as follows: "You think then, I

take it, that what has actually occurred is a better guide than going back to 1965 and looking through a crystal ball?")

MR. CODY: Objection to the "crystal ball" remark, your Honor.

THE COURT: I will allow it.

A. If I can amplify my comment with respect to the word "Better, if I had one year of postacquisition data I think that I would—I know that I would consider that one year of observation. But I would certainly give it lesser weight than I might otherwise do.

If I have, as I have here, five years of postacquisition [457] data, I am quite impressed with that, and I don't know that I'd still use the word "better." But I, nevertheless, would see the five-years' performance, something I must seriously consider, but I would certainly use the word "better" if I had 20 years' of data and I were permitted to sit back with 20 years' of observation and see what actually happened.

So that the question of better and the quality of postacquisition data versus my judgment as of 1964 depends upon how much data I actually have. Here I have five years and I think that is an impressive set of observations.

Q. I am sorry you didn't have 20, but the Government was in a hurry to try this case. Do you have an opinion as to whether the effect of the acquisition of Narragansett by Falstaff had any effect in lessening competition in this industry in New England?

A. Yes.

Q. What is that opinion?

A. I don't think it had that effect.

THE COURT: You what please?

THE WITNESS: I do not believe it had the effect of lessening competition in New England.

MR. SAGAT: Your Honor, same objection, legal conclusion.

[458] THE COURT: Objection noted; overruled. That is what we are trying to find out here. Any help we can get to determine that issue will be welcome.

Q. Have you examined this situation—if you had examined this situation in 1965, preacquisition, would you as an

economist have had the belief that the acquisition would result in substantially lessened competition in this industry in New England?

A. I would have held the same opinion in 1965 as I hold now.

THE COURT: Meaning what?

THE WITNESS: Meaning that in 1965 I would not have thought after studying the New England situation based on the data as of that time that this merger would have had the effect of lessening competition in New England.

THE COURT: Anything further, Mr. Goring?

MR. GORING: Yes, your Honor, but it will be very brief. I am considering the framing of a question which will not offend the Government. Perhaps I can't do it. I haven't been altogether successful.

Q. Having in mind what you said about the effect of this merger in a judgment which you would have given in 1965 before it occurred, and having in mind what you have said to us about your judgment today with respect to the effect [459] of this acquisition upon competition, looking forward do you have an opinion as to whether this acquisition which occurred in July of 1965 will probably lessen competition in the future?

THE COURT: Whether it will or will not?

MR. GORING: Whether it will probably or will not probably lessen competition substantially in the future.

A. Yes.

Q. What is that opinion?

MR. CODY: Postacquisition, your Honor. We object.

THE COURT: Objection overruled.

A. My opinion is that it will not substantially lessen competition, and I would hope it would intensify it.

MR. GORING: You may inquire.

MR. CODY: Excuse me. In view of that perhaps I misunderstood the question. I withdraw that objection.

MR. GORING: You might as well have had it in the record. You might use it in the future. Now you can't.

THE COURT: You hope it will increase competition?

THE WITNESS: Intensify it.

MR. CODY: May I have all that again?

(The reporter read as follows: "Q Having in mind what you said about the effect of this merger in a judgment which you would have given in 1965 before [460] it occurred, and having in mind what you have said to us about your judgment today with respect to the effect of this acquisition upon competition, looking forward do you have an opinion as to whether this acquisition which occurred in July of 1965 will probably lessen competition in the future?

THE COURT: Whether it will or will not?

MR. GORING: Whether it will probably or will not probably lessen competition substantially in the future.

A. Yes.

Q. What is that opinion? * * *

A. My opinion is that it will not substantially lessen competition, and I would hope it would intensify it.")

MR. CODY: I would like to reiterate my objection, postacquisition evidence.

THE COURT: I think your position is clear.

MR. GORING: Mr. Cody, you may inquire.

THE COURT: Now, gentlemen, I think we will take our recess here so there will be no interruption of the cross-examination once it gets underway.

(RECESS)

[461] MR. CODY: Your Honor, before we proceed with our cross-examination of the witness I would like to drop my objection to the last question that was put to the witness, Mr. Horowitz. We withdraw that objection.

THE COURT: Very well; the record will so indicate.

CROSS-EXAMINATION BY MR. SAGAT

"Q. Dr. Horowitz, yesterday in testifying that you had advised the Schlitz Brewing Company in its litigation with the Government a few years ago in reference to its acquisition of Burgermeister—is that correct?

THE COURT: Excuse me just a moment. Mr. Goring seems to be otherwise occupied.

MR. GORING: I am still listening.

A. I performed an economic analysis and gave my eco-

nomic statements of conditions in the national brewing market.

Q. But you did give testimony in that preceeding?

A. Yes.

Q. Do you know if Schlitz won that case?

A. They lost it.

Q. Do you know if diverstiture was ordered in that case at all or in part?

A. It was.

Q. Dr. Horowitz, yesterday you testified to having conducted [462] numerous studies of the brewing industry. These studies were from secondary data, I believe, in large part, weren't they?

A. What do you mean by secondary data?

Q. Let me ask you this: Aside from your consulting with Schlitz in reference to the Schlitz litigation with the Government, and aside from consulting with Falstaff in reference to this litigation, have you ever conducted a study in the brewing industry where you have actually gone out and visited brewing companies other than the companies which I just mentioned—Schlitz and Falstaff?

A. No.

Q. Have you ever used questionnaires—mailed questionnaires to these people to obtain data?

A. No.

Q. I gather then that your studies have been in large part exclusively—excuse me; not in large part—exclusively from what I call secondary data, published sources, then.

A. No.

Q. Would you please explain that then?

A. Yes. The most recent studies made extensive use of a good deal of material gathered by the Government at the —and submitted by the Government at the Schlitz trial, and other evidence data that I had occasion to gather in the course [463] of the Schlitz trial.

The studies have also made considerable use of the Research Company of America's brewing industry survey, which is based on questionnaires and best information obtainable from brewing industry sources.

In the one case where I needed a particular figure from the brewing industry and where the figure was not available, I called the brewery up and obtained the data on a personal—through personal conversation.

Q. Let me ask you this then, Dr. Horowitz: In your direct testimony yesterday, which is on page 106 of the record in this case, you testified that you obtained figures regarding the capacity of Falstaff plants from the Research Company of America. Is that correct?

A. Yes.

Q. Did you ask the Falstaff Company in reference to this litigation for their capacity figures?

A. No, I did not.

Q. Mr. Horowitz, have you ever made the following statement:—

THE COURT: What is that, please?

Q. (Continued) Have you ever made the following statement: "It is becoming apparent that this structure will be one of several, perhaps 10, perhaps 25 major firms serving wide geographical regions. This [464] compares to the present industry populated by more than 100 brewers, many of them so small that they market in only one or two states."?

Have you made that statement ever?

A. I don't recall but it sounds like a statement that I may well have made.

THE COURT: Can you fix the time and place?

MR. SAGAT: Yes, your Honor. I would like to mark for identification an article entitled "Profiles of the Future, The Beer Industry" appearing in the fall 1967 issue of a periodical called "Business Horizons," which on its face is stated to be co-authored by Dr. Horowitz and his wife.

MR. GORING: I object. The appropriate method of dealing with this is to call the witness' attention to the article and ask if that appears in it. The question put to him a moment ago was "Have you ever made that statement?"

MR. CODY: All we are doing is marking this for identification.

MR. GORING: I am addressing myself to the Court. I am addressing myself to the Court.

THE COURT: A little louder, Mr. Goring.

MR. GORING: Beg your pardon?

THE COURT: A little louder.

[465] MR. GORING: I was just telling Mr. Cody I was addressing myself to the Court and not to him.

My point is the appropriate way to inquire into matters of this kind is to call the witness' attention at some point or other to the precise context in which the statement—it is a piece of writing, an article—call his attention to certain sentences in which the statement was made and put the question to him again: "Did you include this comment in an article published in such-and-such a place at such-and-such a time?" There is nothing with which this witness can be impeached as yet.

THE COURT: As I understand it, after the preliminary questions that is just what Mr. Sagat did. He asked the witness if he co-authored this particular statement which appeared in "Profiles of the Future" 1967—

MR. SAGAT: Yes, "Profiles of the Future. The Beer Industry."

THE COURT:—in an article of which he and his wife are co-authors. His answer is yes. It may be marked for identification but for the purpose of cross-examination it doesn't become an exhibit. It is simply used for impeachment purposes.

"Q. Dr. Horowitz, reading from the same article, on page 19: "Although there remain over 100 brewers * * *"

[466] THE COURT: A little slower, please. I want to hear what you are saying.

Q. (Continued) "Although there remain over 100 brewers, extrapolating the pattern of the past two decades to the coming decades leading one to infer that a mere handful of firms will remain by 1985."

Do you recall writing that statement in conjunction with your wife?

A. I don't recall writing the statement but I don't doubt that I did.

THE COURT: Show him the article if there is any question about it.

A. (Continued) Yes.

Q. "Yes" means you wrote the statement?

A. Yes, yes.

MR. SAGAT: Has the Clerk marked this for identification?

THE COURT: You may have it marked if you so desire. I don't know why but I won't rule you can't. The witness has

admitted writing the statement. It is a matter of record now.

MR. SAGAT: Okay.

Q. Dr. Horowitz, yesterday you testified as follows on page 95 of the record in this case:

[467] "THE WITNESS: There have been no demonstrations anyplace that competition and concentration are related."

Then Question by Mr. Goring—

THE COURT: "Competition and concentration are related"?

MR. SAGAT. Yes.

[468] Q. (By Mr. Sagat) Then questioned by Mr. Goring, "And it is your opinion, I take it, that they are not?" And your answer, "Yes." Dr. Horowitz, don't many noted economists take a different view than you took yesterday in your testimony?

A. I think that many noted economists accept different measures of concentration as signals of monopolistic control or competitive activity, or some such term, but the fact that many economists accept this does not leave me to modify my statement that there have not been any demonstrations that there is a necessary relationship between concentration and competition—

THE COURT: Let him finish his answer.

A. (Continued) And, indeed, as I indicated yesterday, the only effort at attempting to secure such a demonstration yielded just the opposite conclusion. I'd be happy to discuss why it did, if you are interested.

Q. Let me ask you, Doctor, the testimony which I read to you from yesterday has two parts to it The first part you said there have been no demonstrations in any place that competition and concentration are related. Then the question was, "And is this your opinion, I take it, that they are not?" And the answer is, "Yes." Have you ever heard, Dr. Horowitz, of John S. Baine?

A. Yes, sir.

Q. Is he a leading noted economist?

[469] "A. Yes, sir.

Q. Are you familiar with his book "Industrial Organization"?

A. Yes, sir.

Q. I quote from "Industrial Organization," Second Edition, by John S. Baine at Page 117. "Given the fact that oligopolistic interdependence of sellers is something that varies by degrees, theoretical logic suggests two related things. First, other things being equal, oligopolistic interdependence becomes stronger as seller concentration becomes higher, or weaker as seller concentration is less. Second, therefore, the higher the degree of seller concentration within oligopoly, the greater is the probability of the adoption of joint monopoly price and output policies by rival sellers. Conversely, the lower the degree of seller concentration in oligopoly, the greater is the probability of some active rivalry among sellers and of departures from joint monopoly policies in the direction of competitive (atomistic) price and output determination." And I quote further from the same work at Page 120. "The higher the degree of seller concentration, the greater should be the tendency toward cooperative action to establish a joint profit maximizing industry price and output and the smaller should be the incentive for individual sellers to pursue independent competitive policies that are designed to enhance their market shares and profit and the expense of their rivals."

[470] Mr. Goring: Excuse me. Is there a question here?

The Court: I thought there was a question as to whether he was familiar with it. You are calling his attention to that statement?

Mr. Goring: The question hasn't been asked.

Mr. Sagat: I'm about to ask the question, your Honor.

The Court: Very well. You're going to ask the question. I thought you were proceeding to something else.

Mr. Sagat: I just want to make a slight check.

Q. Dr. Horowitz, have you ever read those statements?

A. Very likely, I have.

Q. I gather that you don't agree with those statements.

A. No, I didn't say that. I would say that those statements have to be considered very carefully in light of the question of what we mean by concentration, and the question of what concentration is supposed to tell us. The economist always uses—almost always is forced into the position of using one piece of data as a proxy, as a measure for something that he simply cannot measure. For exam-

ple, you cannot measure individuals' welfare, so we used real income of capita, income to measure an individual's welfare. Income isn't welfare, but we use it because we can't measure welfare. Similarly, we can't [471] measure competition in a sense. Therefore, what we attempt to do is to get something that will help us in some way to attempt to reflect the competitive nature of an industry. Now, we have for many years used, or sought a measure of concentration, concentration of sales which will help to reflect the nature of competition of the competitive process in the sense of providing us with a signal, a signal of where there might possibly be deviation and from competitive behavior or monopolistic tendencies. Now, it's true—what's true is that there is, and there has not been, there does not purport to be in that quote any demonstration that competition and any measure of concentration whatsoever are related. There is the statement with which I agree that says that when you have few several firms in an industry, or when you have several firms who are in a position to exercise some control over the market, then the measure of concentration that you have may turn out to be high. In this case, for example, the concentration ratio may turn out to be very high. Therefore, what one should do is to look at the concentration ratio as a signal, as Mr. Baine says, of where we might have probable, where it might be a possible situation of a deviation from competitive behavior. But the reason why there is not a direct relationship between concentration and competition is because, as a signal of pointing us toward a situation that we may wish to look further into, the concentration [472] and concentration measure, the concentration ratio, more than most, is ambiguous, and it's ambiguous in the sense that it can point us both to situations in which there are, in fact, deviations from competition and it's also as well a situation which there are not, so that the concentration ratio itself doesn't tell us anything about how competitive the industry actually is. It simply calls our attention to a situation that we might want to devote more of our time to looking into.

Q. Dr. Horowitz, you studied at M.I.T., didn't you?

A. Yes, sir.

Q. Did you ever hear of a professor by the name of Morris Alderman?

A. Yes, sir.

Q. Is he a noted economist in the area of industrial organization?

A. Yes, sir.

"Q. Dr. Horowitz, Mr. Alderman stated in an article in "Review of Economics and Statistics," Volume XLI, February, 1959, called "Differential Rates and Change in Concentration." He said, "The proper object of study is fewness of sellers or buyers, dispersion has no economic consequences. Fewness is an essential part of the theory and study of competition and monopoly." I gather from what you said previously you would generally agree with that statement?

A. I would agree with the statement that fewness in numbers is a significant issue in industrial structure.

[473] "Q. Have you ever heard of Dr. John Blair?

A. Yes.

Q. Has he been the economist associated with the Senate Anti-trust Committee?

A. As I recall, that is true.

Q. Do you consider him a noted economist?

A. Frankly, no.

Q. In the Oxford Bulletin at Oxford University Institute of Statistics, Bulletin XVIII, Dr. Blair, there is an article called "Statistical Measures of Concentration in Business: Problems of Compiling and in Interpretation." Dr. Blair said in that article, "It is the dominance of the few, quite apart from the numbers of sellers, which tends to influence the market." I gather because you do not consider Dr. Blair a noted economist, that you don't agree with that statement?

Mr Goring: I object to that question, because the witness already said he does not regard him as a noted economist, I take it that means he does not regard him as an authority.

The Court: Well, that may be, but I think this is an area of legitimate cross-examination. He may ask him whether he agrees or not with that statement.

The Witness: May I hear the statement reread?

The Court: Surely.

[474] (Question read back.)

Q. It is the dominance of the few quite apart from the number of sellers which tends to influence the market?

A. Absent particular detail of a particular industry, I couldn't agree or disagree with that statement.

Q. Do you know anything about Dr. Blair's qualifications?

A. Yes, I met Dr. Blair and chatted with him.

Q. Can you inform the Court of his qualifications?

A. I don't remember his background now, but he has—

Q. Okay. That's fine.

A. Data.

Q. Mr. Horowitz, please listen to this statement: "A trend towards concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anti-competitive effect of a merger may be." Do you agree with that statement, Dr. Horowitz?

MR. GORING: I don't believe that the quote is exactly correct. It doesn't sound like proper English for a professor. The word "relative" in your question, I assume the word should be "relevant."

MR. SAGAT: Excuse me. "Relevant." Thank you very much.

THE WITNESS: May I have it read to me again?

THE COURT: Yes.

[475] Q. I will try to be more precise, and the statement is, "A trend towards concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anti-competitive effect of a market may be."

MR. GORING: May I be informed as to what the source of this quote is?

MR. SAGAT: This is Mr. Justice Black speaking in the United States versus Pabst Brewing Company, 384 U.S., 546 at 552, 553. The full sentence reads, "We hold that a trend towards concentration," and it goes on.

MR. GORING: As far as I know, Mr. Justice Black, our distinguished jurist, is not a noted economist. In view of the fact that the quotation was incomplete and misleading, and therefore improper, I object to it.

MR. SAGAT: I disagree that the quotation was incomplete

or misleading. It is the sum and substance of the last sentence in the United States vs. Pabst Brewing Company. Mr. Justice Black speaking for the majority of the court.

[476] THE COURT: Well, that is a legal holding. I don't know that that is necessarily a matter of common knowledge, when you are dealing here with an economist, a scholar; are you not?

MR. SAGAT: Yes, Dr. Horowitz is an economist.

THE COURT: Well, the doctor, if he can answer, may give his opinion.

A. I disgree with that, with the economics of that.

Q. Dr. Horowitz, yesterday defense counsel asked the following question, page 97, of the trial record: "Q. I use the term 'giants' metaphorically, Mr. Horowitz. By that I really meant the larger people in the industry.

A. Yes, I was assuming you meant the larger people in the industry, and I was personally thinking about people such as Anheuser-Busch, Schlitz, Pabst, Coors."

In 1964 what was the rank of Coors in the United States as a seller of beer?

A. I don't recall the exact rank.

MR. SAGAT: Your Honor, I would like to refer to the stipulation in this case which will show—

THE COURT: Exhibit 1, is it?

MR. SAGAT: Exhibit 1, which will show that in 1964 Coors ranked No. 9 in the national in beer sales.

MR. GORING: I object and ask that be striken. This [477] is not the time for Government Counsel to testify in rebuttal.

THE COURT: What's that again?

MR. GORING: This is not the time for Government counsel to testify in rebuttal. It is not a question of the witness.

THE COURT: I didn't know Government counsel was testifying.

MR. GORING: It strikes me that is what is happening. He is referring to evidence probably admissible in rebuttal.

THE COURT: He said this is a stipulation already in the record.

MR. GORING: Very well. This is not the time to review it.

THE COURT: I don't follow you, frankly.

Q. Dr. Horowitz, in 1964 do you recall what the rank of Falstaff was in the nation in beer sales?

A. Yes, I suspect that they were fourth or fifth.

THE COURT: Fourth or fifth?

THE WITNESS: I suspect. I don't know. I suspect that that is true.

Q. I'd like to inform you that according to the stipulation in this case, Exhibit 1,' Falstaff was No. 4.

MR. SAGAT: In the nation, yes.

Q. So, Dr. Horowitz, I take it then that if you would consider Coors to be one of the largerpeople in the industry and Mr. Goring in his question indicated that he defined the word "giant" to mean the larger people in the industry, that Falstaff in 1964, being No. 4, would be larger and more giant than Coors, being No. 9; is that correct?

A. In 1964 Falstaff was undoubtedly larger than Coors.

Q. Dr. Horowitz, yesterday you testified that "the giants have been relatively quiet in the merger area though they have attempted, there have been a couple of attempts of the giants to merge, but either these were dissolved in the courts or cut short." Do you recall what—

MR. GORING: What page?

Q. —what attempts were made by the giants to merge?

MR. GORING: Will you refer me to the page?

MR. SAGAT: Yes, that is page 97.

A. If we are speaking about the same four firms that I referred to previously, Coors, Pabst, Anheuser-Busch and Schlitz, I can recall the Pabst and Blatz merger of, I believe, 1958, and there was the Schlitz merger with Burghermeister. I forget whether it was a merger or acquisition of Burgermeister by Pabst, and of course [479] Schlitz also acquired at one point 40 percent interest in Labott's of Canada, and Labott's had some percentage interest in the General Brewing Corporation of California. And it was those two, that situation that existed at the time of the Schlitz trial. And I think, thought I don't recall theexact details, I think that Anheuser-Busch attempted or actually did buy the—maybe the Regal Brewery, or I believe it was a brewery in Florida that they were subsequently asked to sell. I'm not certain of the latter.

Q. Do you recall whether in each of those cases the Government brought suit against those acquisitions by, first, Pabst?

A. Yes.

Q. What was the disposition of that suit?

MR. GORING: I object.

THE COURT: I don't see the materiality. I will sustain the objection. I don't see the materiality of the result.

Q. Again, I refer to the statement on page 97, the answer to question No. 2, where the witness states: "The giants have been relatively quiet in the merger area though they have attempted, there have been a couple of attempts of the giants to merge, but either these were dissolved [480] in the courts or cut short."

Dr. Horowitz, in 1964, October 16, 1964, Joseph Griesedieck, the president of Falstaff Brewing Company, made a statement which is contained in Exhibit 17 of the Government's case in a speech before a panel of security analysts in New York City. The question was: "How does your company's marketing position today compare with that of five years ago?"

Mr. Griesedieck: In 1959," answering now, "with sales of 4,911,196 barrels, we ranked third in the industry. Last year, although our sales had advanced to 5,548,176 barrels, we ranked fifth in the industry's standing. I would like to point out, however, that as a single brand we still rate third in sales.

During the period mergers and acquisitions among others of the top five in the industry increased, the number of brands sold by these competitors—"

Dr. Horowitz, have you read all of the evidence in this case?

A. I've seen the Government's pretrial brief and I've seen Falstaff's pretrial brief, and I don't know what constitutes the "all." That is what I have read.

Q. Have you read the exhibits in evidence in this case prior to your testimony yesterday?

[481] A. I've seen some of them but I don't know whether I've seen all of them or not.

Q. Yesterday, Dr. Horowitz, at page 103 of the record in answer to question No. 2 on that page, you stated: "One great advantage that the nationals have had is their great willingness to expand their capacity and to enlarge in multiplant operation."

Do you know if over the years Falstaff has enlarged in multiplant operations and has expanded capacity?

A. Yes.

Q. Dr. Horowitz, yesterday you testified at page 112 as follows—

Mr. Sagat: Now I would like to say at this point that prior to this testimony in the record there are a number of objections made by the Government, and Your Honor allowed the witness to go ahead on the assurance of Mr. Goring that the defense would provide evidence regarding, I suppose it was, the New England market in particular. The responding witness responded on the basis of making assumptions.

I would like to make it clear while I am going to discuss the witness' testimony which is based upon assumption, the Government does not waive the objection that it made which was left to the defense having to produce [482] evidence of behavior in the New England market in particular.

Q. Dr. Horowitz, yesterday you stated as follows: "Assuming that price in New England has remained comparatively constant, this would be an indication of a high degree of competition and rivalry among the existing firms selling in New England." I gather there when you say "competition" you mean nonprice competition?

A. No.

Mr. Goring: I missed that question. May I have it read?

The Court: I didn't get it all.

(The question and answer were read.)

Q. But you do mean that competition is largely, if not almost exclusively, accomplished by advertising and promotional devices as opposed to reduction in price?

A. No. May I—

Q. One moment. In your article entitled "Profits and the Future of the Beer Industry," and I think if I show it to you you will recall making this statement, and I'd be glad to supply counsel a copy—

Mr. Goring: We have a copy. What page?

Mr. Sagat: Page 10, the right-hand column.

Q. You wrote: "As is common in monopolistically com-

petitive [483] markets, firms have eschewed price competition in favor of brand and quality distinctions, as well as advertising efforts, as the major competitive tools. One can single out the alleged price assault by Anheuser-Busch on Falstaff, their recent reduction in the price of Pabst from the premium to the popular price category. Basically, however, brewers have not been inclined to resort to price competition as a means of increasing sales, except in the sense of a tendency to maintain price in the face of efforts to secure price increases."

Yesterday, Dr. Horowitz, in making your statement with respect to the New England market you were basing your statement upon assumptions, and those assumptions were taken from your general knowledge of the market. Isn't it so that in the national market there is most of the time except for those few instances singled out in your article a situation where there is nonprice competition and competition conducted by brand and quality distinctions and advertising efforts?

A. There are all of those things plus, as I indicate in the article, the maintaining of prices rather than the rise in price that we would expect to get in a non-competitive—under a non-competitive climate when [484] costs rise. So there has been price competition in the sense of maintaining prices rather than increasing prices at a time when costs have been increasing and when one would expect there would be a price rise in the absence of price competition.

Q. Dr. Horowitz, in this case there is a stipulation, Exhibit 30. Both parties, the defendant as well as the plaintiff, have stipulated that in 1964 the eight largest sellers of beer in the six-state New England area accounted for 81.2 percent of total sales of beer in that area.

Isn't that a relatively high concentration figure? As an economist would you say that the New England market has an oligopoly structure?

A. I would say that the New England market is concentrated and the New England market is clearly a market with several firms.

THE COURT: With what?

THE WITNESS: With several firms. That is, it has more than three firms and fewer than an infinite number of firms which falls within the definition of oligopoly.

THE COURT: It is now 12:30, gentlemen. Let us stop here until 2:00 o'clock.

(Noon Recess)

[485]

*AFTERNOON SESSION*
*2:00 P.M.*

MR. SAGAT: Your Honor, I would like to have read back the last question that I asked.

(Last question read by reporter as follows: "Both parties, the defendant as well as the plaintiff, have stipulated that in 1964 the eight largest sellers of beer in the six-state New England area accounted for 81.2 percent of total sales of beer in that area.

"Isn't that a relatively high concentration figure? As an economist would you say that the New England market has an oligopoly structure?

"A. I would say that the New England market is concentrated and the New England market is clearly a market with several firms.")

THE COURT: "Is clearly with" what, please?

THE CLERK: A market with several firms.

(Reading of last question and answer resumed by reporter as follows: "With several firms. That is, it has more than three firms and fewer than an infinite number of firms which falls within the definition of oligopoly."

[486] Q. Dr. Horowitz, Joe S. Bain has made the following statement:—

THE COURT: Joe who?

MR. SAGAT: Bain—B-a-i-n.

Q. (Continued) "As type 3 oligopolies—"

THE COURT: As what, please?

MR. SAGAT: Oligopolies—o-l-i-g-o-p-o-l-i-e-s.

Q. (Continued) "As type 3 oligopolies we may recognize industries of high-moderate concentration ***"

THE COURT: High moderate?

MR. SAGAT: High-moderate concentration.

Q. (Continued) "*** in the sense that the first eight sell-

ers will ordinarily control roughly 70 to 85 percent of total output and the first four roughly 50 to 65 percent with the total number of sellers ordinarily being larger than in the preceding categories."

Dr. Horowitz, do you agree with Dr. Bain's statement?

A. First of all, I don't know what he is classifying as a type 3 oligopoly so that—if you will tell me what he means by a type 3 oligopoly, I will be happy to tell you whether I agree or don't agree with him.

Q. Dr. Horowitz, by the sentence which I just read Dr. Bain [487] is defining a type 3 oligopoly.

A. I am forced to permit Dr. Bain any definition that he cares to use for a type 3 or type 2 or 4 oligopoly. The word, "oligopoly," as used in economics and economic theory, derives directly from a series of words; a monopoly—

THE COURT: Derives from a series?

A. (Continued)—derives directly from a series of very logical definitions; a monopoly being an industry that houses one firm; a duopoly being an industry that houses two firms; a triopoly being an industry that houses three firms—all of whom produce, by the way, a homogeneous product—a polypoly—

THE COURT: A which?

THE WITNESS: Polypoly—p-o-l-y-p-o-l-y.

A. (Continued) Polypoly constitutes an industry with many firms—infinite number of firms, if you will—such that no one firm can exercise anything but a negligible influence on price no matter what the firm does.

Commonly these days we don't use the word, "polypoly," in economic theory. We use the words wither "pure competition" or "perfect competition." There is a slight difference between the two terms but I don't think that is important for our purposes here.

An oligopoly then falls somewhere in between a [488] triopoly and polypoly in the sense that if we wanted to speak about an industry with three firms, we would say triopoly; and in an oligopoly we have an industry with several firms, each of whom recognizes the presence of the other firms and recognizes the fact that in some way they are dependent upon the—in some way the behavior in the

market will be conditioned by the actions of these other firms as well as by the actions that they themselves take.

Q. Dr. Horowitz, does an oligopoly in your opinion only refer to an industry where the product is homogeneous?

A. Not these days; certainly, no, because—certainly not because we recognize that firms in the real world—not in economic theory, but firms in the real world do not produce homogeneous products; that is, that one product produced by one firm is not the same as the product produced by the other firms. So that we speak these days of differentiated products or slightly differentiated products.

Q. Dr. Horowitz, I am going to read to you another statement by Dr. Bain: "When product differentiation is conjoined * * *"

THE COURT: Is what?

MR. SAGAT: Conjoined.

Q. (Continued) "* * * with higher seller concentration, on the [489] other hand, the interdependence of competing sellers is much more likely to result in parallelism of product and sales promotion policies and in a much reduced variety of genuine product and price alternatives open to buyers. Also, the substitution of intensive and expensive non-price competition for price competition in such concentrated markets may raise acute issues of excesses in product and sales promotion costs."

Do you agree with that statement?

A. There are undoubtedly some industries for which that is true and there are undoubtedly some industries for which that is false. Sometimes it does and sometimes it doesn't.

Q. Dr. Horowitz, in 1964 do you know what the national sales ranking of the National Brewing Company was?

THE COURT: National Brewing Company?

A. I would guess—I don't know but I would think it between 20th and the 25th perhaps.

Q. Do you know in 1964 what the national sales ranking of the Stroh's Brewing Company was?

THE COURT: How do you spell that?

MR. SAGAT: S-t-r-o-h.

A. Oh, perhaps somewhere in the high teens but I don't know exactly.

[490] Q. In 1964 do you know what the national sales ranking of the Schmidt Brewing Company was?

A. I couldn't remember 1964, no.

Q. In 1964 do you recall what the national sales ranking of the Duquesne Brewing Company was?

MR. GORING: I am going to object to this line of questioning being carried further. This is not an examination of anything given in direct. I think the national sales ranking of all these firms appears in evidence in one of the exhibits. I am not absolutely certain but I think that is so. If this is testing the doctor's memory, it is a little afield in cross-examination.

THE COURT: What is the purpose of this particular line of inquiry?

MR. SAGAT: I am going to bring out in approximately two questions what the line of inquiry is. Dr. Horowitz testified this morning in respect to these companies being—

THE COURT: These particular companies?

MR. SAGAT:: Yes, he did.

THE COURT: I will accept your assurance he did. I don't recall it, frankly. There have been so many different avenues opened up. What is the materiality of this line of inquiry?

MR. SAGAT: The materiality is to show that none of [491] these companies was as substantial as the Falstaff Brewing Company which in 1964 had a national sales ranking of number 4.

MR. CODY: If I may say, Your Honor, we have no idea what the purpose of the defendant's placing this in evidence was either.

THE COURT: You say this morning this witness testified as to the standing of these particular companies? I don't recall any such testimony.

MR. CODY: Their existence, your Honor.

MR. SAGAT: He testified as to these companies being—I believe—being regional brewers that were contiguous to the New England market.

THE COURT: Well, now, let's see. You say he named them as being contiguous to the New England market?

MR. CODY: According to the defendant, your Honor.

MR. GORING: I don't recall that testimony.

THE COURT: I don't recall any such testimony.

MR. GORING: I am not prepared to contradict you flatly but I don't recall it.

MR. CODY: There were certain— and we were not clear at the time, your Honor,—there was certain testimony given as to what regional brewers were closer to New England in the witness' opinion than Falstaff—if that [492] is a correct recollection. I don't know what this means but I think to fully understand, now that this has been placed in evidence, what the relevance of it is is to understand what particular rank these corporations held with respect to Falstaff Brewing Corporation. That is all we seek to show at this time.

THE COURT: Let me see where—Well, my notes do indicate that near the close of Mr. Goring's direct examination he did ask the witness what other regional brewers there were near the New England sales area; and among the breweries I believe the witness named National Brewing Company as one, Genesee in Rochester as another, Stroh's in Detroit:—saying that it did sell in several states— Schmidt in Philadelphia.

MR. GORING: That is correct. I did make that inquiry.

THE COURT: This relates to—

MR. CODY: I think their size, your Honor, and their ranking among other brewers had some bearing upon whatever it is Mr. Goring is trying to prove.

MR. GORING: That may very well be so, in which case it seems to me it is part of the Government's rebuttal.

THE COURT: Is what?

MR. GORING: Part of the Governments rebuttal.

THE COURT: I think it is proper cross-examination if [493] this witness has testified in direct.

Let's see. Is there a question pending?

(Last question read by reporter as follows: "In 1964 do you recall what the national sales ranking of the Duquesne Brewing Company was?")

A. Yes, of the five or six brewers that I mentioned I believe that Duquesne was the lowest ranking of all of them, and in that year Duquesne was someplace in the neighborhood—between 25th and 30th. In the latest issue of the building industry survey for the first time they specifically state that they are publishing the statistics on the leading

30 firms in the industry because of the specific need to include Duquesne as a leading brewer because it brews in the neighborhood of a million barrels a year.

And since Duquesne was between, say, 25th and 30th, undoubtedly all the others were somewhere at least—somewhere in that area.

Q. Do you know Duquesne's national sales ranking in 1964?

A. I don't recall. I don't recall, no, but I would judge they were—they have traditionally over this last decade been somewhere between 25th and 30th.

Q. Dr. Horowitz, do you recall the national sales ranking of the Genesee Brewing Company in 1964?

A. No, I do not.

[494] Q. Dr. Horowitz, in your opinion were either the National Brewing Company, Stroh's, Schmidt, Duquesne, or Genesee as substantial as Falstaff which ranked number 4 in 1964?

A. None of those firms sold as much beer in 1964 as did Falstaff.

THE COURT: As what?

THE WITNESS: As did Falstaff.

THE COURT: As did Falstaff.

Q. Dr. Horowitz, do you know if either National Brewing, Stroh's, Schmidt, Duquesne, Genesee had as high a total of assets as Falstaff in 1964?

A. I don't know but I would suspect not.

Q. In 1964 in your opinion, Dr. Horowitz, which brewing companies in the New England market were viable competitors?

A. Anheuser-Busch, Schlitz, National—I am sorry—Schlitz, Miller, Pabst, Rheingold, Schaefer; and Narragansett was a viable competitor in 1964.

[495] A. (Continued) There probably are other firms as well, but I think those are the major ones that come to my mind.

THE COURT: What about Ballantine?

THE WITNESS: Yes, Ballantine was showing considerable weakness back then, but yes, Ballantine.

Q. Dr. Horowitz, in 1964, in areas outside of New Eng-

land, what brewers do you consider to be viable competitors?

A. I really haven't looked at the financial statements of all the brewers. Anheuser-Busch, Pabst, Schlitz, Millers, Hamms, Koors, Falstaff, Olympia, and I presume, Ranier, Jackson, Pearl—

Q. I'm satisfied. Dr. Horowitz, I'm going to read a series of statements from the article which you wrote entitled "Profiles of the Future in the Beer Industry." If you like, I can provide you with the article to refresh your recollection.

THE COURT: Would you like a copy of it?

THE WITNESS: No.

Q. Did you make the following statement: "By preventing merger of healthy firms and accepting mergers that will permit sinking firms to survive the industry, high standards of performance can be maintained."

A. Yes.

Q. Further, "Mergers are frequently cut short in life of firms that had been exhibiting considerable competitive potential."

[496] A. Yes.

Q. "Firms are going to fall by the wayside because of their inability to compete effectively and when they do, others will seek to acquire their plants, their brands and their distribution systems. There is little economic justification in seeking to prevent this. We can, however, attempt to influence who the acquiring firms should be and where possible, favor the weaker firms that seek to use the merger to strengthen themselves. Still further, we can prevent the merger of healthy competitors which would cut off the life of one and therby increase the market power of the others."

A. Yes.

Q. "First, merger can mean the acquisition of a brewery and distribution system in a geographical region that the acquiring firm seeks to enter. Acquisition of the properties of a dying firm can be a less expensive way of achieving this than setting up an entirely new distribution system and building a new brewery."

A. Yes.

Q. Did you write that statement?

A. Yes.

Q. Dr. Horowitz, yesterday and this morning, you on the stand outlined, using a number of assumptions, the reasons why you believed that Falstaff would have been in error in constructing a brewery in the New England market. I assume that the assumptions [497] which you were making were not unreasonable, am I correct?

A. Well, I consider them to be extraordinarily optimistic assumptions. I think that I would consider them to be unreasonable in the sense of being unreasonably optimistic.

Q. But you did not come into this court to testify and make statements based on assumptions that were unrealistic, unreasonable or highly improbable?

A. What I attempted to do was to place the object of building a brewery in its most favorable possible light. Whether I consider that most favorable possible light to be a very likely light or not, and then on that basis, I analysed the problem.

Q. I believe this morning and yesterday that using your assumptions you estimated that the return on Falstaff's investment from building a brewery in New England would be slightly less than 6.7%, is that correct, sir?

A. Based on certain assumptions, yes.

Q. In making this estimate of 6.7%, is it right, is it correct to say that essentially what you did was compare what you thought Falstaff's investment would have been in order to build a brewery and to compare that investment to the income in the future, which you estimated using assumptions would accrue to that brewery from producing and selling beer in New England?

A. Yes.

[498] Q. I believe yesterday that you testified that a national brewer obtained certain advantages—

Mr. Goring: What page, please?

Mr. Sagat: Page 103 to 104 of the transcirpt.

Q. National, of course, have in addition to their capacity, have the great advantage of national recognition which includes the advantages given to them, both by the ability to advertise in the national media, as well as the advantage of selling beer in a country which has multi-people population where a good deal of travel goes on, and somebody from New England, for example, would be traveling out to the

West Coast, permanently or otherwise, knows that he can buy Budweiser or Shlitz, Millers or Pabst in California, just as he can in Rhode Island, and that's a considerable advantage that the regionals do not enjoy. Dr. Horowitz, you have just testified that in making your estimate of 6.7%, you compared what Falstaff's investment in a new brewery in your opinion would be with what you estimated would be the earning accruing to that new brewery from sales in New England, would not it be proper economic estimation to also include the increase to Falstaff's earnings which would result from the presence of Falstaff in New England such that Falstaff would obtain the advantages of advertising, the advantages of people knowing that they could get Falstaff Beer if they would travel across the country. In other words, wouldn't Falstaff, [499] as a result of going to New England, sell more beer in other parts of the country, using your description of the advantages to Falstaff that would be obtained, and should not an estimate of the future earnings that would acrue or be compared to the investment cost in building a brewery in New England should impose increased earnings be compared to that investment cost?

A. If it were possible for us to make a reasonable determination of both the monetary value of any benefits, that being a national brewer, would bring to the brewer, and if it were further possible for us to determine exactly when and for how long these benefits would last, and indeed, what, if any, increment to Falstaff's profitability in its other operation would result from having a brewery in New England, and then, yes, those additions, all revenues, should certainly be included in a computation.

Q. So, in other words, because of the difficulty of estimation, you chose in making this estimate, to ignore those additional revenues?

A. No, I chose to ignore those additional revenues for the simple reason that I wanted to present to myself in analysing the situation, a set of figures that I could not dispute with myself. That is to say, a set of what I consider to be highly optimistic figures, without attempting to become more specific, about a particular revenue. For example, we ought to attempt to be [500] more realistic, and say that if Falstaff were to build a brewery in New England, that they would probably, that they would likely be selling beer

at 30 or 40 or 50% of capacity for the first ten years, perhaps increasing sales and undoubtedly—perhaps never selling more than one hundred percent of capacity. I prefer not to build in that kind of an assumption, as well as another questionable assumption as to what the exact value of being a national brewer is, since I don't know exactly the value of being a national brewer, what it is or would be to Falstaff, nor do I feel I can estimate that.

Q. But giving the advantage which would accrue to a national brewer, which you have testified to, and taking your assumption, optimistic or otherwise, it would be the case, wouldn't it? That if the additional earnings which Falstaff would accrue in other parts of the country, besides New England, were included in your calculations, the estimate of return would be higher than 6.7%?

A. Yes. Any addition to revenues would raise the return above 6.7%.

Q. I think you said this morning that in looking at the situation or in using your estimation model, whatever you might call it, that you should look at building a brewery in New England as making any other investment, is that correct?

[501] A. Yes.

Q. Do you estimate what the return to Falstaff would be, using the same process of comparing earnings to investment, and in a situation which you are going to bring up, let's take the best earning picture. Let's take the year 1964 for Narragansett, when they earned $713,000, and then Falstaff paid to Narragansett $19,500,000. What is the return on investment to Falstaff for the Narragansett acquisition?

A. That is not a meaningful question.

Q. If Narragansett, if the acquisition of Narragansett is an investment for Falstaff, just like the building of a brewery would be for Falstaff, certainly a return on investment could be calculated?

A. Yes. But we would have to know for how many years they would receive the dollar profit and when those—and what we have to know, what the revenue stream is, I don't mean to exaggerate this situation, but if you pay $19,000,000 for a brewery, you get back $713,000, you would have a good deal of money lost there. You simply have got to get the $713,000 for any number of years beyond the

first year, and if you will tell me, because I can't remember the calculations exactly, what the dollar per barrel profit was for Naragansett, in that year, and based on my previous assumption, I'd be happy to answer the question.

Q. If the future earnings of Narragansett can be assumed to be the [502] same as it was in 1964, the highest earning year for Narragansett, when earnings were $713,000, if those earnings are assumed to take place in the future, and even forgetting the fact that earnings coming in the future are worth less than earnings today, would it not be the case that dividing $19,500,000 into $713,000, the return to Falstaff under those assumptions would be no more than the 3.7%?

A. The computation is too quick for me—are you saying dividing $713,000 by $19,000,000?

Q. Yes.

A. That sounds correct, yes.

Q. If you'd like, I can give you a piece of paper.

A. No, that sounds accurate.

MR. SAGAT: Excuse me for one moment.

[503] MR. SAGAT: No further questions.

MR. CODY: Your Honor, may we have one minute or so just to review our notes?

THE COURT: Surely.

MR. SAGAT: May I ask one last question?

THE COURT: One last question you may have.

Q. Dr. Horowitz, do you know if the Dawson Brewery has gone out of business?

A. My recollection is that the brewery is still in operation, but I believe it was acquired by Rheingold. I think Rhengold perhaps acquired the brewery. The brewery was steadily losing sales, I know that, for a 20-year period prior to the acquisition.

MR. CODY: We object, your Honor.

THE COURT: On what grounds?

MR. CODY: The question was whether it was still in business. It seems to be a simple yes-or-no answer.

THE COURT: The witness says he believes the brewery is still in operation but was acquired by someone else.

MR. CODY: That would be the answer.

THE COURT: Is that it, Mr. Witness? Read the answer.

(The last answer was read)

[504] MR. CODY: After "Rheingold" I move to strike, not responsive.

THE COURT: It may be stricken.

MR. SAGAT: No further questions, your Honor.

REDIRECT-EXAMINATION BY MR. GORING

Q. What would you say about the condition of Dawson's at the present time?

A. The condition with respect to what?

MR. CODY: Objection, your Honor; postacquisition evidence.

THE COURT: Objection overruled.

MR. CODY: What their condition at this time is is of no relevance to this case.

THE COURT: I take when question was directed by counsel for the Government to the witness, apparently counsel knew that Dawson's had gone out of business recently.

MR. CODY: Well, no, your Honor. The witness testified to certain breweries in 1964 which were available in New England or which were close to New England or possibly available to serve New England. One that was left out was Dawson's, and we simply wanted to show that it was acquired.

THE COURT: The question was: "Has Dawson's gone [505] out of business?" That is the question your associate put to the witness.

MR. CODY: Yes.

THE COURT: He didn't limit it to whether it went out of business before July 1964 or after July 1964.

MR. CODY: Withdrawn.

Q. Do you know what happened to Dawson in or after 1964?

A. Yes, I know that the brewery was acquired. I think that it was acquired by Rheingold.

Q. Do you know in what year, approximately? Roughly; I'm not interested in precision on this one.

A. 4, 5, 6, something like that period.

Q. Do you know how healthy a business it was doing at that time?

A. Yes, I do.

Q. How healthy was it?

A. They were doing very poorly. They were producing at approximately one-sixth or one-seventh of their rated capacity, that is, their capacity was rated as anywhere in the neighborhood of 750- to 800,000 barrels a year, a very old brewery, and since approximately 1945, with the exception of one or two years, their sales have been steadily declining until in the mid-60s they sold perhaps 110,000 barrels out of the 750- to 800,000-barrel brewery.

[506] Most of those sales I believe were in Massachusetts, say, about 60 percent of their total business was in Massachusetts.

Q. Having in mind that Falstaff did not sell in the Metropolitan New York market nor did it sell in any substantial qualities in any market between Washington, D. C. and Richmond, Virginia, and New England, that it did not sell in any significant quantity in any market lying between Ohio and New England, does the entry into New England make them qualify for the term "national brewer?"

A. Not if they remained out of the earlier markets you mentioned.

Q. By that you mean not until they were able to enter those markets?

A. That's correct, not until they had entered particularly New York City.

Q. Does the word Oligopoly have any connotation of improper business conduct of any kind?

A. No, it does not.

Q. Does it have any connotation of antitrust violation?

A. No, it does not.

MR. SAGAT: Objection.

MR. CODY: That is a conclusion of law.

[507] MR. GORING: That is a construction of a word, gentlemen.

MR. CODY: If I may know his definition of antitrust violation and also oligopoly, perhaps we can compare it. Until then it seems like a conclusion.

MR. GORING: Do you object?

MR. CODY: Yes.

THE COURT: Suppose you define it. Have the witness define for us what oligopoly is.

MR. GORING: He has done that.

THE COURT: Let him do it again.

Q. Define it again.

A. An oligopoly is an industry in which there are several firms such as that each firm recognizes that the other firms in the industry have an effect on the market.

Q. Does it have any connotation of price-fixing about it, the word itself?

A. No, it does not.

Q. Does it have any connotation with respect to restraint of trade?

A. No, it does not.

Mr. Cody: Objection, your Honor. This witness is not qualified to testify about the antitrust laws or [508] restraint of trade. If he wants to give an economic definition of oligopoly—

The Court: Do you suggest his definition is inaccurate.

Mr. Cody: At this point I will have to check with my economic expert, Mr. Sagat. But as far as the witness giving a definition of oligopoly, I have no objection whatsoever. If he wants to testify about the antitrust laws or restraint of trade, I would like his qualifications spelled out in the record.

The Court: Well, he has given his opinion. We will leave it there.

Mr. Goring: The reason I troubled to ask that question is the Government uses that word as a dirty word in all these cases.

Mr. Sagat: Your Honor, May I make a statement? I disagree with Mr. Goring's characterization of "oligopoly is a dirty word." The Supreme Court used the word and applied the term in FTC against Proctor-Gamble.

The Court: What's that again?

Mr. Sagat: I disagree with Mr. Goring's characterization of oligopoly as being a dirty word of the Government. The Supreme Court in FTC vs. Proctor-Gamble also used the word, applied the word in finding against [509] Proctor-Gamble Company.

The Court: Your objection is noted.

Mr. Goring: I have no further questions.

Mr. Cody: Excuse me, your Honor. May I have the last two or three questions read over?

The Court: For what purpose?

Mr. Cody: I'd like to find out if the witness did answer as to a restraint of trade.

(The reporter read as follows: "Q Does the word 'oligopoly' have any connotation of improper business conduct of any kind?

A. No, it does not.

Q. Does it have any connotation of antitrust violation?

A. No, it does not.")

MR. CODY: That we object to. The witness is not qualified as to antitrust laws unless he wishes to testify as to their violation, and oligopoly can very well be a violation of the antitrust laws and at the same time there may be, without submitting the Department of Justice to any position, there may not be. But I am sure the witness would agree if he were asked if it could be.

THE COURT: You are saying it does not necessarily—?

MR. CODY: Correct, but the witness is now testifying [510] definitely no, and he has no qualifications whatsoever to testify to that.

MR. GORING: It is not true oligopoly in industry, that that alone is a violation of antitrust.

THE COURT: I wouldn't think so.

MR. CODY: That was not the question.

MR. GORING: When I say to a witness, "What does this word connote," the question is what does it mean with respect to restraints in trade, if anything.

THE COURT: Then you followed it up, Mr. Goring, with the question of whether or not it connoted a violation of the antitrust laws.

(The testimony previously read was reread.)

THE COURT: Your point is it may or may not, depending upon the circumstances; is that it?

MR. CODY: Correct, and I don't believe the witness is qualified to answer the question.

THE COURT: What are you doing? Moving to have the answer stricken?

MR. CODY: I do.

THE COURT: The answer may be stricken. Defendant's objection to the Court's ruling is noted.

MR. CODY: May we have the next questions asked of the witness?

[511] (The reporter read as follows: "Q Does it have any connotation of price-fixing about it, the word itself?

A. No, it does not.

Q. Does it have any connotation with respect to restraint of trade?

A. No, it does not.")

MR. CODY: At this point, if I may again, I question the witness', Mr. Horowitz', capabilities to get into that and move to strike.

THE COURT: What was your objection?

MR. CODY: My objection is that Mr. Horowitz has not been qualified as an antitrust expert and that price-fixing is part of the antitrust law.

THE COURT: I will allow it to stand. I think we all know what price-fixing is without being antitrust lawyers.

MR. CODY: We hate to think so.

THE COURT: Is there another question?

[512] JOSEPH GRIESEDIECK, first having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GORING

Q. (By Mr. Goring) What is your position with the Falstaff Brewing Company?

A. Chairman of the Board and President.

Q. How long have you been President of the company?

A. Since 1953.

Q. How long have you been Chairman of the Board?

A. Since May of this year.

Q. May of what?

A. This year.

Q. Before that time that you became President, you were, I take it, in the employ of the company?

A. That's correct.

Q. Tell me when you first went into the employ of Falstaff and your progress from that time to the time you became president and your responsibilities in that period.

A. After graduating from Cornell University in 1940, I joined Falstaff as a brewer apprentice and spent two years, approximately, well, about a year and a half in the brewer apprenticeship program in which I spent various times in various parts of the plant, the brewing part, the Aging Department, the Bottling Department and aging and selling, et cetera, et cetera. In [513] all the other facets of the business, at which time I was scheduled to go to brew-

ing school, but World War II interfered and I joined the Navy and spent four years in the Navy, after which I returned to Falstaff in 1945 as an Assistant Chief Engineer of the company. After five years later I was made Assistant to the President, helped by the fact that my father was the President. And then I was made Acting General Manager and in 1953 elected President. I've been President ever since.

Q. How long have you been a member of the Board?

A. Approximately since 1950. I'd have to look at the record to be sure. I don't know.

Q. Has it been a devout desire of Falstaff management to get into the New England market for a period of time? Has it not?

A. In terms of our desire to go national, we have never denied that is correct.

Q. And you have never made any attempt to conceal that ambition?

A. Not at all.

Q. Would the company have entered the New England market in any other way other than by acquisition of some sort?

MR. CODY: Objection, your Honor. It's purely conjecture.

THE COURT: Purely conjecture? Well, at least during the time he was an engineer, this witness has been Chairman of the Board and President, it would seem to me it's [514] hardly conjectural.

MR. CODY: We don't even know, your Honor, if it was considered during this period.

MR. GORING: I will enlighten you as to this shortly.

MR. CODY: Very well. We'll withdraw the objection, your Honor.

MR. GORING: May we have the question read?

(Question read back.)

A. No, it would not have.

Q. I take it it was your view that the company should not.

A. It should not have, based on our experience in other markets, correct.

Q. I take it that was the view of other parts of the management personnel in higher echelon?

A. It was the unanimous view of our whole Executive Board and committees.

Q. What, sir?

A. The unanimous view of the entire Executive Committee and the Board of Directors.

Q. To pinpoint this to a degree, had you ever entertained the idea in this period of time from approximately 1950 on, let's say, of building a brewery in New England?

A. No, sir.

[515] Q. Why not?

A. In the first place, we had no sales in New England, had no sales in New England, and for us to have attempted to finance a brewery of the size of which we believed necessary above a million barrels, there was no way that we could estimate to any degree of certainty what kind of sales we would generate after we built the brewery, and therefore, it would have been rather a difficult thing for us in my opinion to borrow the money. Certainly we never could have justified it to our stockholders, because we did find it very difficult to open in major metropolitan markets where entrenched rulers were already doing business without a decent distributor system. That is, the reason why we did acquire, it was the distributorship purely and simply.

Q. Tell me something about the problems of securing a distribution system of any viable nature.

A. As you possibly recall, there was some reference made in this trial to the Arthur D. Little Study, which was submitted in 1960, and they recommended in that study that we consider opening in some major metropolitan area in the midwest, such as Chicago, Detroit, Cleveland. Prior to this we had been developing a market contiguous to our district territory, primarily areas where there were no local brewers and where the distributorships were available. We opened in Detroit, [516] for example. We found a brewer who was doing business in that market primarily, such as Strauss, which was mentioned here, Gopel, Pfeiffer, and maybe one or two others, plus the national brands, with the exception of national brands, most of these brewers had branch operations. This is true also in Cleveland, and it's true in many other metropolitan centers, such as New York, St. Louis and others. We found in Detroit that we could not get distributor organizations to put us in that market unless we built ourselves, so we developed three

distributors, exclusively for Falstaff, and invested at the rate of $50 a barrel. In advertising on the market, we consider our advertising rates that we could sustain in the area of about $2.00 and $3.00 a barrel. And this is obviously an investment that could not be maintained for any length of time. After the first six months, we found we had to cut this back, and we were not able to hold the volume in the market that we started with. The result is these wholesalers over a period of three years all went broke, and we had to look for others. Since that time we have gotten at least four major changes, each time having to acquire one which is less viable. That is even necessary to really do a job. We had the same experience in Cleveland, the same experience in Chicago. To date we can't find a wholesaler in New York, even now. So when we decided to look into New England, there was no other way, in [517] our opinion, to open that market unless we could get proper distribution. Now, the report that has been alluded to about other breweries we could have purchased, none of them had a distributor organization which in our opinion was viable. All brands were going downhill with the exception of Narragansett. Narragansett was acquired primarily because it had wholesaler system, exclusively Narragansett product, that we could introduce Falstaff here as a competing market, and as a result, we concluded that was the logical way to open in New England market. Without that, we never would have come into New England, I can assure you of that.

Q. When was the attempt made to penetrate the Detroit market?

A. 1961.

Q. When was the attempt made to penetrate the Chicago market?

A. I suspect right around a year or so after that, and even today in Chicago, I say even today in both Chicago and Detroit, we would probably be doing less than 1% of the total business that either of those markets do.

Q. Was there a time when you tried to enter the market in the southern California area?

A. That's right.

Q. Did you at that time have brewing facilities in the market in the northern section of California?

A. That's correct.

[513] Q. And what was your experience in your attempt to enter this southern California market?

A. Well, again, it's part of the Little recommendation, a lot of which, by the way, we didn't buy, particularly with reference to the branch operation. We bought property in southern California for the devout purpose of building a brewery there as soon as our volume in the marketplace justified its construction. We opened in the northern California market in 1953, and I think went to southern California about two years later, I'm not sure of that exact date. Our results in southern California were less than successful. We were unable again to acquire viable distributorship—

[519] MR. GORING: I wonder if you could go a little slower. We don't want to wear this young man out.

THE COURT: And the Court must hear this. Go a little slower if you will please.

MR. CODY: Also, Your Honor, may I take this opportunity to say that the Little Report that the witness referred to is Government's exhibit 10.

MR. GORING: That is correct.

THE WITNESS: The answer in southern California was a disasterous one. Today, for example, we are practically out of the market. We were not in any way able to justify building a brewery and have since sold the property. All of those experiences forewarned us about the difficulty of opening any new market of a major metropolitan nature in a competitive area that exists in the brewing industry today and if any of the members of the Government have ever tried to make a retail call I'd assume they couldn't open the market with a brand even with unlimited capital. I would point out that it takes years to build up that brand image in that market place.

Q. Go on.

A. For example, our goal in opening for New England has been in the arena of about one percent of the market for first year with growth there after. We recognize it doesn't happen overnight.

MR. CODY: Objection, Your Honor, as to the aspect of the witness testifying to what would amount to be post acquisition evidence. We move to strike.

THE COURT: Motion denied, objection noted.

[520] Q. What have your experiences been in the New England market since the acquisition of Narragansett?

A. Our experience has been less than successful. We opened the market for Falstaff in Rhode Island and part of Massachusetts and Connecticut about 1966 I think and to date have done a minimal job.

MR. CODY: Same objection.

THE COURT: Objection noted, overruled.

Q. What has happened to the barrelage sales of Narragansett from the Narragansett operation taking that part by itself in the years between 1965 and the present time?

MR. CODY: Same objection, Your Honor.

A. They have declined.

THE COURT: Objection noted, overruled.

Q. What has happened to the net revenue derived from the Narragansett segment of your operation in that period of time?

MR. CODY: Same objection, Your Honor.

THE COURT: Overruled.

A. Declined.

Q. A little or a lot?

A. A lot, in fact, a loss.

Q. Can you give me an approximate round figure of the decline in net revenue from the Narragansett segment of your operation?

A. As was stated earlier when we acquired Narragansett it had [521] an income that particular year of about $700,000 after taxes.

THE COURT: I didn't get that.

THE WITNESS: Approximately $700,000 after taxes was the income of Narragansett in the last year in which the figures were published prior to our acquisition. This year, and the several years since that time we have lost in the neighborhood of, on an annualized basis, four or five-hundred thousand dollars. This year we hope to be able to break at an even point.

Q. When you say you lost, you mean it was a decline from the earlier income or in the red figures?

A. In the red figures.

MR. CODY: Same objection.

THE COURT: Motion to strike?

MR. CODY: Yes, Your Honor.

THE COURT: Motion denied, motion to strike denied. Objection noted.

[522] MR. CODY: Excuse me, your Honor, When I make that objection I don't mean to burden the Court. It was simply to direct the Court to our objection and to strike the evidence or remove it from the record.

THE COURT: I understand.

MR. CODY: I also intend to bring to the Court's attention again the contention as to the weight that such evidence should be given,—

THE COURT: To any post—

MR. CODY: As outlined in our brief which the Court cares to accept.

THE COURT: Relating to any post-merger situation.

MR. CODY: Correct, your Honor; yes.

Q. There was a time when there were some discussions and in fact negotiations between Falstaff and Liebmann, was there not?

A. Yes.

Q. Do you recall the time when those discussions were initiated?

A. Somewhere in the period between 1960 and 1963, I think; in that range.

Q. Did you seek out Liebmann's on this subject or did someone seek you out?

A. Someone sought us out.

Q. Who was it?

[523] a. A broker named Suslack.

Q. S-u-s—

A. S-u-s-l-a-c-k.

Q. He was not an employee of Liebmann's, I take it.

A. No, he was not. He was a business broker, business finder, putter together,—whatever they call it.

Q. You were seriously interested in acquiring Liebmann's during the course of negotiations?

A. Very much so.

Q. And explain to me why?

A. This would have given us an opportunity to get into the City of New York, which, as Mr. Horowitz has stated, is essential in becoming a national brewer. Again this is a

market that would not in our opinion have been opened in any other way for us with another plant, and building a plant again required a distributing arm. Liebmann had all that.

Q. Did Liebmann have a distributor organization of some competence?

A. The combination of distributor and branch operations. By "branch" I mean they were their own distributor in terms of certain parts of the New York market as against an independent distributor.

Q. Those negotiations were not fruitful?

[524] A. That is correct.

Q. And the thought of acquiring Liebmann's was abandoned?

A. Correct.

Q. Do you recall approximately what year that you walked away from each other?

A. Approximately '63 or '4, or somewhere in that period.

Q. Had you been able to acquire Liebmann's, would you or would you not have had any further interest at that time in penetrating the New England market?

Mr. Cody: Objection, your Honor. That is purely conjectural.

The Court: I don't know that it is. This is the President of the corporation.

Mr. Goring: I venture to remind your Honor of Mr. Cody's fervent opening in which he said they had always had a gnawing desire to enter New England.

The Court: I recall that. It is a question of just how gnawing it was.

Mr. Cody: The Government will stipulate that Liebmann at that time did sell beer in New England, so I assume if they had acquired Liebmann—

The Court: What is that again?

Mr. Cody: The Government will stipulate at that time Liebmann Breweries or Rheingold did sell beer in New England. [525] The defendant, if they had acquired Liebmann or Rheingold, would have been in New England.

The Witness: In a very limited way.

Mr. Cody: I withdraw the objection.

The Court: Go ahead. Let's proceed.

Q. Had you acquired Liebmann, you would not have con-

sidered you were penetrating the New England market as well, would you?

A. No, because—I think some reference has been made here to the competitors in New England as being Rheingold and others. I must remind you that prior to 1965 Liebmann—or Rheingold, as we call it,—was in New England in a very minimal way. Their only market in New England was Connecticut. Most of that business was in western Connecticut which is oriented to the New York television media.

In 1965 they had acquired the Ruppert brewery, and Ruppert was a dominant factor in Massachusetts, in New England, so that the figures that are now showing for the sales in New England of Rheingold really are mostly Ruppert sales and not Rheingold sales.

Ruppert, by the way, had bought the Dawson Brewery, which was mentioned earlier, in about 1964, so that when Rheingold acquired Ruppert, which, I might say, was a direct competitor, it thus acquired Dawson with it.

[526] Q. You were not at the time of the acquisition a competitor of Narragansett, were you?

A. In no way.

THE COURT: You mean at the time of the acquisition of Narragansett?

MR. GORING: Yes.

Q. You did not meet head to head in anyplace?

A. No.

THE COURT: You were not in the New England market at that time.

THE WITNESS: No, your Honor. As the counsel stated, at that time our boundaries were relatively the Ohio markets, western Ohio markets, principally Toledo. We were in Richmond, Virginia, in south Virginia; minimally in Washington, D.C., primarily the military; and we were not in Pennsylvania nor were we in New Jersey, New York, or New England. Today we are still not in some of those states.

Q. When did the first discussion occur between you or your people and Narragansett?

A. As I recall, we were contacted—and I think this is in the deposition I gave—in 1961 by a Mr. Maloney of Hem-

phill-Noyes. At that time the firm was known as Hemphill-Noyes; today it is called Hemphill, Noyes, Hornblower & Weeks. This gentleman had been the financial [527] adviser—or the firm had—of the Haffenreffer family, and he contacted either me directly or perhaps one of our other officers,—I can't recall—and asked if we had any interest in looking into the possibility of a merger with the Narragansett Brewing Company. We said we did and we met with Mr. Maloney in New York. I said "we." It was myself and Mr. Vollmer who has been referred to previously.

We discussed the matter. Mr. Maloney indicated that since the figures were not public, he would have to advise us about what their asking price might be or their interest, but was not at liberty to show us the figures.

After that meeting he came back to us and indicated that he thought the price tag would be in such-and-such a range, —and I can't recall what that was—but they were reluctant to really sit down and give us any real information about the company.

At that point we had had some contact on the Rheingold situation so we dropped the whole matter.

That was the initial contact.

Q. And when was the first set of negotiations abandoned?

A. Approximately sometime in 1961. I could be wrong six months one way or the other. It is in the record someplace.

Q. That is close enough for my purposes. You had not initiated these discussions yourself?

[528] A. No.

Q. You never called on Narragansett?

A. No. In fact, we were very close friends of the Haffenreffers. If we felt there was an interest, we could have done it easily but we had no idea there was an interest.

Q. And you never discussed such proposition with them before Maloney called on you?

A. No.

Q. Those negotiations obviously were resumed at some point. How did that occur?

A. When the Rheingold merger was terminated because another party stepped in and bought it, frankly, while we were still looking, we then were, I think, again contacted by Mr. Maloney after it was made public that our negotiations with Rheingold were terminated. Again we were asked if

we were still interested in further looking at the eastern area and in looking at Narragansett. We indicated we were but again we felt we had to have access to some figures. So at this point negotiations really began in earnest and we were able to sit down with the Haffenreffers at some point in this period of '64, '65,—I don't remember which—and were able to review the matter and make a thorough analysis of the operations, and made a decision to move ahead, and the merger was concluded in July, I [528] think, of '65.

I might add that naturally the question of being in a trust situation was paramount in our minds. It was also the opinion of our attorneys since we were not a competitor of Narragansett in any part of the United States, this was a perfectly legal move in their opinion.

MR. CODY: The Government disagrees with their opinion, your Honor.

THE WITNESS: Obviously.

THE COURT: That seems to be apparent.

MR. GORING: That does not surprise me, your Honor.

THE COURT: Pardon?

MR. GORING: That does not surprise me even though it may shock me somewhat.

THE COURT: Very well; we will take a short recess at this point and recover from that shock.

(RECESS)

[530] Q. I take it there are more problems in connection with selling beer in a new territory than merely the distribution system?

A. Quite obviously that is merely one arm.

Q. Now, will you expand on the problems in addition to the need of a distribution system in selling beer in a new market.

A. Well, if we could take a typical market such as Boston, for example, in the first place we have to have distribution, but it has to be a distributor who basically has other brands, in the case of a new market I am referring to now, and because of the fact that he needs to have enough from the sales of his other brands to enable us to build in that market at a pace that we can afford to do when compared with the competition that is in that market, been entrenched perhaps for 10 or 15 years, and who are spending generally at a more substantial rate in terms of adver-

tising, merchandising, et cetera, than we can afford to commit to that market if we are going to remain profitable.

So that in effect the first point is proper distribution. In other words, a successful distributor.

MR. CODY: Excuse me. I was wondering what the witness meant by "typical sales area like Boston."

[531] MR. GORING: You will have an opportunity to ask him.

THE WITNESS: Do you want me to answer it now?

Q. No. Answer my questions or questions from the Judge at the present time, and you needn't pay any attention to anyone else at the present. Go ahead.

A. Once given that, of course, then the next question is the size of the market in terms of the way the beer is sold. For example, what we have in the brewing industry we call two types of sales outlets. One we call the on-premise outlet where the beer is sold over the bar, over the tavern bar; and the off-premise outlet which is where the beer is sold to take home.

The business is done differently in the different types in terms of the fact the off-premise outfit generally speaking requires displays, promotions, point-of-sale advertising, and by and large the consumer makes the decision pretty much independently of the retailer. That is why retailer attitude is not necessarily the criteria to being successful in the market because that only gets you distribution. That doesn't get you the sales to the consumer.

On the on-premise outfit which is generally a combination of package beer over the bar and draft, is [532] an entirely different selling job. There one has to work with the sampling job with the consumer which attempts to convince him with personalized selling compared to what he has heard advertised or seen advertised, as a newcomer in the market should be given a trial. This often takes a long time, to switch somebody's brand.

It has been evident time and time again with every new brand coming into the market that curiosity sampling takes place, and then within a period of time without proper followup sales incentives and what-have-you, people switch back to their own brands.

It is very, very difficult to swing people to other brands. Advertising alone is not the answer. It may be the answer in certain products. It may be the answer in certain catego-

ries, but it alone in the beer business is not the sole factor. You figure that over $200,000,000 are being spent in the total media picture by all brewers throughout the country; that is the minimum figure. It is pretty hard for anyone brewer to say something new and different about his product.

Beer is bought emotionally many times, not rationally, not like you'd buy a car or something like that. Brand loyalty is very difficult to acquire and can also be lost if you are out of the marketplace by such as a [533] strike, so that in addition to the distribution you've got to have a proper advertising-merchandising tool. The product itself has to be acceptable, and that is also a problem today because the product taste has been changing. The younger consumer, what we call our prime beer market is the 18-to-35 age group, is demanding blander and blander products all the time, so one has to continue to keep its product tuned to the marketplace.

Ale, for example, has been declining steadily in New England, and this is part of the problem in the Narragansett situation because their ale sales have been on the decline as Ballentine's, as mentioned. The heavier product, people just don't want it today.

New products are being introduced into the industry, malt liquors and now various types of fruit-flavored beer. So again one has to be on top of the new products area and constantly researching possibilities of introduction of other brands, other products.

In addition to those factors, or course the final one would be the selling manpower that the brewery itself puts into the field to offset that of the wholesalers. In the case of opening a market like in Boston or a typical market, Detroit or Chicago or any major metropolitan area large in size, and like many, many outlets, this requires [534] a substantial amount of manpower for a period of time. And so again one can't open too many markets at the same time because much depends on the manpower you have. If they don't click very well we feel lucky to gross 2 percent a year in the growth factor. That's the problem as we look at it.

It is a different problem in a rural market where you have a much more influential factor in the distributor himself who often times will know every retailer in the community, and he does the best selling to them, the market like

in Texarcana, Arkansas, for example, where our particular wholesalers are known by every retailer in the community, and what he says about a product they buy.

That is not true in the major metropolitan areas where the retailers are so numerous that the close association that the distributor has is limited and therefore it does take a longer time to cover the market.

Q. These problems are substantial even in cases of acquiring a going concern; are they not?

A. Yes, they are.

Q. They are far more substantial if you tried to enter the market cold on your own; are they not?

A. To a degree we would have entered this market cold on our own. That would have been and that was my [535] recommendation to our board of directors.

MR. CODY: Objection to the question. It seems to be leading and suggests the answer to the witness.

THE COURT: I don't think it suggested the answer. The answer is not quite what was expected, Mr. Cody?

MR. CODY: I'm not sure in that case it was responsive, your Honor.

THE COURT: I will sustain the objection to the question. The answer may be stricken.

Q. Is television advertising an important element in advertising beer or is it not?

A. Probably the most important.

Q. Had you made an attempt to penetrate the New England market cold-turkey on your own, what have you to say about the availability of TV advertising for the new brewer?

A. I think that would not have been a problem. It is question of how much money we could afford to put into it, but the availability of the spot-type program is there. I think the reference was made here by the Government earlier, I think on Monday, to the effect that Falstaff has done a very vigorous advertising job in its growth and cited, I think, "The Game of the Week."

Now, "The Game of the Week" was a TV show that we [536] put together on baseball. However, it was limited to those areas where there are no major-league cities. This precluded us from using this opening in any major metropolitan market in the United States.

[537] Q. Since the acquisition of Narragansett have you made a vigorous attempt to get Falstaff accepted in New England?

A. We have.

Q. Have you made vigorous attempts to push it and sell it?

A. We have.

Q. And has that involved a fair investment—

A. It has.

Q. (Continued) —in development?

A. Yes.

Q. Can you tell me in approximate figures how much money you lost in trying to get into Detroit?

A. It would be difficult for me to pin down how much we lost because I would have to look at the records because these markets—we have what is called a distributor profit analysis which breaks the profit down by its various markets or loss, as the case may be. And certain allocations are made by the amount of advertising that is allocated to that market. And we have what we call the definition of a market as a cluster. It is called a TV cluster. In other words, Detroit would be a TV cluster because that is where your television and radio advertising emanate from and the area that will be covered by that TV signal, by and large, would be the market we are referring to. It could be a 50-mile radius of Detroit or something. I would have to [538] look that up on our distributor profit analysis sheet to tell you. I don't recall just what we lost but there was a loss factor.

The biggest problem there was the distributor lost money to the degree that he went bankrupt—or they did, I should say. We replaced him with another distributor and he went bankrupt. After a period of three years our figures declined from 52,000 barrels annually in that area today to about 9,000.

Q. I hesitate to remind you of this, but since you are returning to this courtroom on Tuesday perhaps you can get me that information.

A. I would be happy to get it.

Q. There was testimony here this morning or yesterday, I should say, that beer prices over a period of years, say, from 1955 through the present time have as a nationwide proposition been relatively stable and that they have not

advanced—they have not increased in any fashion to keep step with the cost of producing and selling beer. Do you have any information about the situation in New England as far as that is concerned in that period, '55 to the present time?

A. '55—

MR. CODY: Objection to post-acquisition evidence, your Honor.

[539] A. (Continued) '55—

MR. CODY: And I don't believe there has been any previous testimony from the witness as to this point.

MR. GORING: You asked me to give you assurance, or the Court asked me to give you assurance and him that I would produce a witness—

MR. CODY: Pardon?

MR. GORING: —that I would produce a witness who is able to testify on this subject. I assured the Court I would, and the Court admitted some testimony on the basis of my assurance. All I am doing is keeping my word. If you don't want it in, I will abandon the question.

MR. CODY: May I hear the question?

(Last question, as above, read by reporter)

MR. CODY: Same objection, your Honor.

THE COURT: Objection overruled.

MR. GORING: I am going to withdraw the question. I have kept my word and I will not produce any other witness and put this question to him.

THE COURT: You have already produced some testimony to that effect which I allowed.

Q. What did you know in the period of time in which you were negotiating with Narragansett—by that I mean the time when you had your early negotiations—

[540] THE COURT: '61, was it?

MR. GORING: '61.

Q. (Continued) —and the time when the later negotiations were resumed and bore fruit—what did you know about the competition and the competitive situation in the New England states?

A. If we take the period of 1961 we, of course, had access to the published figures of sales by states which we—

our market research department accumulates for the whole country where they are available. Generally speaking, from knowledge of the brewers that were doing business there and contacts with them at various trade associations we had a feel of what the picture was.

However, prior to that, right around the '64 area when we really became serious about this move, then we, of course, did quite a bit more probing of the actual factors in the marketplace to supplement what information we already had.

Q. Were you familiar with the intensity of competition in New England?

A. No question about that.

Q. Now there have been—

MR. GORING: Excuse me.

MR. CODY: May I object, your Honor? I am not sure [541] what "intensity of competition" means.

THE WITNESS: Dog eat dog.

MR. GORING: The only tool I have to ask questions is the English language.

THE COURT: I think we all know what "intense" means, don't we? I think "intensity" would be apparent as well.

MR. CODY: I think this morning we have been over the subject of competition in economic terms. Perhaps it might be put in more commercial terms to Mr. Griesedieck.

THE COURT: Meaning what?

MR. CODY: I am not just sure what "intensity of competition" means.

THE COURT: You made the suggestion—what do you mean—might be put to him in other terms?

MR. CODY: An explanation of what Falstaff, in other words, expected to encounter when it entered that market rather than intensity of competition. But my objection is not that strong and—

THE COURT: I think I realize what is meant by counsel. If the witness understands the question, I will allow it.

MR CODY: Very well. Withdrawn.

THE COURT: Now let's have the question.

(Last question, as above, read by reporter)

THE COURT: Assuming there was intensity of competition.

[542] A. I can assure you that the competition in New England is no different from the rest of the United States.

Q. Almost as an aside two or three minutes ago you characterized the competition in New England. Characterize it again.

A. That slang expression I just used?

Q. Yes.

A. It was dog eat dog. I can tell you that. It still is.

THE COURT: Real strenuous competition, I take it?

THE WITNESS: I would hate to tell you some of the tactics, your Honor.

Q. And you knew in advance of this acquisition you were going to have to face that problem?

A. Well, there was no question about it because, as I just explained, we had been through this problem in Detroit, Chicago, Cleveland, all markets, which were equally as intense, with local brewers, national brewers, all the same factors that were applied in New England.

Q. I understand that there has been in the years beginning approximately 1965 a change in the price practices of some of the larger brewers in New England. Is that correct?

THE WITNESS: Let me have that again.

(Last question, as above, read by reporter)

MR. CODY: Post-acquisition evidence, your Honor. We object.

[543] MR. GORING: Indeed it is.

A. May I inquire as to what you mean: a change in the price practices? I am not quite familiar with what you are referring to.

Q. What happened to the prices of Anheuser brews at some time in the period from 1965 to the present time?

MR. CODY: Same objection.

THE COURT: Objection noted, overruled.

A. New England is really no different than any other part of the United States. They and Schlitz and other national brands—

THE COURT: What is that?

A. (Continued) Budweiser, Schlitz, and other national brands were practicing throughout the United States—not limited to New England—price promotions of various types where they would have specials, many situations where they were actually priced under our price in many markets in the United States, under the Schaefer price, under the Rheingold price,—New York, for instance, Boston, places like this. This is part of their merchandising process, you might say, using a price promotion as a means of gaining extra sales.

It is difficult, of course,—

THE COURT: You mean reducing—you mean they reduced prices to stimulate sales?

[544] THE WITNESS: A price promotion basis, your Honor. In other words, for a period of two weeks they have a two-week "Pick A Player" special, something like that, where prices would be reduced to a consumer on a special to get a trial. We have done the same thing in many markets. This is a common practice in the industry.

However, those brands—these national brands—when they do it, there is a tendency on the part of the consumer to feel he is getting a bargain, so to speak. So the effect is much more, much greater, I should say, when they do it then when we attempt to do it because in the public eye we are not a national beer, even though we are in New England, because we are not in any of the major cities of the East.

Q. And the net result, I take it, is that the premium brews can be bought by consumers at a price not higher than the ordinary brew.

A. In many instances in many parts of the United States that is true.

Q. Was it true in New England in 1965 and '6?

A. In that period since that time there have been promotions, post-offs. That is a way of life in New England just like it is everywhere else.

Q. Has that had any effect upon the performance of Narragansett [545] in the intervening period?

MR. CODY: Same objection.

A. It certainly has. I think—the graphs you demonstrated the other day show without question the growth of

the national brands at the expense of the regional brands. Certainly price promotion is one area for—

MR. CODY: Objection. I don't see that the witness has the qualifications to testify about the graphs that have been placed in evidence today.

THE WITNESS: I drew the graphs up.

MR. CODY: I understood the first witness did.

THE WITNESS: At my instruction. I have seen the graphs. We keep them constantly all the time. I was aware of the marketplace figures. I could quote them to you like a book.

Q. You don't mean literally you drew them?

A. I don't mean literally I drew them. They are a constant moving average of all brands in all markets at all times.

MR. CODY: I think the graphs speak for themselves, your Honor.

THE WITNESS: I think they do too.

MR. CODY: Especially with the first witness' testimony.

MR. GORING: I think that is what the witness said: they do speak for themselves.

[546] THE COURT: I don't think there is any dispute about that.

MR. GORING: If the Court please, I suggested to your Honor this morning Mr. Griesedieck and my associate, Mr. McLaughlin, have a tight plane schedule and I suggested that perhaps 10 minutes cut off at the end of the day would improve their chances of getting their flight. I must now refer to the correct time which is 20 minutes after 4:00.

THE COURT: We don't want them to miss their flight. As much as they might like to stay in Rhode Island, I assume they prefer to go home.

THE WITNESS: If the weather would stay like this I would be happy to stay because it is 50 degrees in St. Louis.

THE COURT: We cannot guarantee that. We will stop here until Tuesday morning next at 10:00 o'clock.

MR. CODY: Very well, your Honor.

(Adjourned at 4:20 p.m. until Tuesday, October 13, 1970, at 10:00 a.m.)

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA
*v.*
FALSTAFF BREWING CORPORATION
C.A. No. 3523

Before his Honor, Chief Judge Day

Tuesday, October 13, 1970

APPEARANCES:

For the Government: Philip F. Cody, Esq.
Bruce Repetto, Esq.
Kenneth A. Sagat, Esq.
Department of Justice
Antitrust Division

For the Defendant: Hinckley, Allen, Salisbury & Parsons; Matthew W. Goring, Esq. of counsel
Jerome M. McLaughlin, Esq.
St. Louis, Missouri

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[549] *FIFTH DAY*

*10:00 A.M.*

MR. CODY: Good morning, your Honor. Before we begin I have two subjects to bring up. First of all, I would like to introduce to the Court Mr. Kenneth G. Elzinga, who is an economist with the Department of Justice, and I would like the Court's permission to have him sit at counsel table with us during the testimony.

THE COURT: Permission granted.

MR. CODY: Second of all, your Honor, we were informed this morning by the defendant that Mr. Carl Haffenreffer, former officer of Narragansett, will testify in this case and he is expected to testify on Thursday afternoon.

It was not within my comprehension that this trial would run more than Thursday or Wednesday afternoon at most. When I asked Mr. Goring why Mr. Haffenreffer was available only on Thursday afternoon, I was informed that that was Mr. Haffenreffer's decision.

Now I see no reason why this trial should be interrupted, why Government counsel, as well as defense counsel, should be inconvenienced, as well as our economist, simply because Mr. Haffenreffer has to decide exactly when he wishes to testify. I would think that defense counsel would make Mr. Haffenreffer available so that he might [550] testify in the same order after the—In other words, in a logical order without an interruption which inconveniences not only the Court but counsel as well.

MR. GORING: I think I said something about this matter in my opening. The fact is that Mr. Haffenreffer is not a witness within my complete control, as your Honor knows.

THE COURT: I don't know that. But where is he?

MR. GORING: He is at the present moment in Vermont. And when I told him that I thought I might very well need him on Tuesday or Wednesday of this week, he told me he could not return until Thursday and he expects to be traveling down here on Thursday morning and assures me he will be available at 2:00 o'clock.

I intended to ask your Honor's indulgence on this matter. As your Honor knows, we have done our very best to keep this case moving and have succeeded to every degree except this one. And while I regret interrupting this case, I cannot do better than I have done. I have Mr. Haffenreffer's assurance, which I accept, that he will be here ready to take the stand at 2:00 o'clock on Thursday.

THE COURT: If we have some rebuttal, Mr. Goring, it puts this Court in an extremely difficult position because next Monday is motion day and Tuesday we open a new term of court. It would be impossible for me to be concerned [551] with this case next week.

MR. GORING: I realize that, your Honor. I would have no objection whatever to the Government beginning its rebuttal case at the end of the testimony of Mr. Griesedieck.

THE COURT: When do you expect to conclude the defendant's case, apart from Mr. Haffenreffer?

MR. GORING: I will conclude the defendant's case with Mr. Haffenreffer's testimony.

THE COURT: I mean assume that Mr. Haffenreffer is not here, when would you be likely to conclude the defendant's case—except for Mr. Haffenreffer?

MR. GORING: I will have concluded the defendant's case when Mr. Griesedieck leaves the stand, except for Mr. Haffenreffer.

THE COURT: In other words, at the conclusion of the testimony of the witness who is on the stand now, you will have concluded the defendant's case?

MR. GORING: Except for Mr. Haffenreffer.

Mr. Haffenreffer's testimony in direct will not take more than three-quarters of an hour at the outside.

THE COURT: Mr. Haffenreffer is subject to subpoena, isn't he, in this case?

MR. GORING: Not in Vermont.

THE COURT: Oh, he is in Vermont?

[552] MR. GORING: Yes.

THE COURT: I thought you said Rhode Island.

MR. GORING: No, no. Were he in Rhode Island, I would not make this suggestion.

THE COURT: I think Mr. Haffenreffer owes it to you and to this Court to inconvenience himself to be here, Mr. Goring. Is he on vacation up there?

MR. GORING: Yes, your Honor. He is visiting friends there.

THE COURT: It seems to me Narragansett Brewing Company, in which he presumably has an interest,—

MR. GORING: He has no interest now.

THE COURT: He may well have. We don't know whether he has or not. The issue is whether or not this merger was valid, is it not?

MR. GORING: That still won't give him an interest in Narragansett. Your Honor has dismissed him out of this case.

THE COURT: Be that as it may, I think the Court is entitled to some consideration and you are. Counsel are here from Washington. It seems an imposition on their time to expect them to wait at least two days for his arrival.

MR. GORING: Let me make this attempt. Let me make the attempt, as soon as I can reach Mr. Haffenreffer by phone, —I shall start trying mid-morning recess—to [553] advise him of the difficulty in which he is placing this Court and me and see if—

THE COURT: I would appreciate it if you would.

MR. GORING: (Continued) —I can persuade him to be here tomorrow morning. I shall do it if I can. If not, I shall throw myself on your mercy again.

THE COURT: I am anxious for the parties to have their day in court here. I have other commitments that make it absolutely imperative that this case be concluded before Friday of this week.

MR. GORING: I fully realize that.

THE COURT: I have arraignments on Friday. I have other matters that are going to require my attention on Friday. I certainly assumed this case would be completed by tomorrow at the latest from the way you gentlemen were making progress. The Court is appreciative of the efforts you have made to move this case along rapidly. I will appreciate your talking to Mr. Haffenreffer and seeing if you can get him down here.

MR. GORING: I shall do my best—

THE COURT: I don't think he will suffer irreparable injury is he has to come a day earlier.

[554] MR. CODY: I believe under the Clayton Act Mr. Haffenreffer is subpoenable.

THE COURT: That thought occurs to me, but you gentlemen are more familiar with that problem than the Court.

MR. CODY: I represent to the Court we may issue subpoenas to be served from us on the Court's order.

THE COURT: At first blush certainly I thought so, but if you are correct, Mr. Goring, that is another element you can consider.

JOSEPH GRIESEDIECK, RESUMED

DIRECT-EXAMINATION BY MR. GORING (cont'd)

Q. I asked you the other day, Mr. Griesedieck, to tell us something about the problems of penetrating a new market like the New England market by acquisition as you did, and you told me what some of those problems were. Would they have been more or less substantial had you tried making entry, let us say, by building a brewery and creating a distribution system rather than by acquisition?

A. Well, I think I have stated previously that they would have been much more difficult because the key element, one of the key elements that I mentioned as one of the items necssary in opening any new market would have been missed, namely, that of the successful distributorship.

[555] Q. Give us a breakdown of the stockholding in Falstaff Brewing Corporation.

A. In rough terms out of a total of approximately 4½-million shares outstanding there are about 890,000 shares held betweeen three major family groups, the Beffa family —well, it's really two groups: the Beffa family and the Griesedieck family. Of the remaining shares approximately one million are held—about a million-two, I should say—Correction. About a million-one are held by brokers, in brokers' names, that is, and the balance is held by thousands of other stockholder.

THE COURT: Thousands? How many thousands?

THE WITNESS: The total number of stockholders the last time we checked, your Honor, was approximately 13,000.

Q. Now, do you have in such fashion as you can testify about it the figures showing the loss which you sustained in

the Detroit operation in your attempt to penetrate the Detroit market?

A. Yes. I think I recall stating here Friday that we keep what we call a distributor profit analysis statement on each market with which we do business. Yesterday in St. Louis I obtained the information on the Detroit market for the period that I think we talked about, and I have it with me.

[556] MR. CODY: May we see it, your Honor?

THE COURT: Certainly, if he is going to testify from it.

Q. Are you using those papers which you have in front of you to refresh your recollection?

A. Yes, sir.

Q. How were they prepared?

A. They were prepared by a comptroller in two different ways. First of all, without any proration of home office expense, which is the preliminary manner in which the markets are compared, and then for the perusual of the executive officers, the home office expenses are prorated among all markets based on a percentage of the barrelage sold. These figures would be with and without home office expense proration.

Q. They were prepared at your direction?

A. That's corect. Just a minute. I gave you the wrong sheet.

MR. GORING: I offer these two sheets to be marked as Defendant's exhibit for identification, Defendant's Exhibit I.

THE COURT: I for identification.

THE CLERK: Sheet entitled "Falstaff Brewing Corporation and Subsidiaries Income Statement—Detroit Cluster, [557] Twelve months ended 12-13-61—'69." The second sheet, "Falstaff Brewing Corporation and Subsidiaries, Income statement—Detroit Cluster—12 Months ended 12-31-61—69."

MR. GORING: I'm wrong. Those are duplicates.

THE WITNESS: If you will look at them, one has a proration of home office expenses and the other doesn't, as I recall.

THE CLERK: Two sheets, I for Identification.

(Above-described documents marked Defendant's Exhibit I for Identification.)

MR. CODY: Your Honor, may I ask for time for the staff to study these sheets? It doesn't seem it is something we can do in a couple of minutes here before they are offered in evidence.

THE COURT: The court is unaware of the contents. If you think you need reasonable time to examine them you may.

MR. GORING: Let me offer now the Chicago sheets of the same sort so counsel for the Government can use those at the same time.

Q. Do you have those?

A. Yes, sir.

THE COURT: These are similar sheets for the Chicago [558] pententration so-called?

THE WITNESS: Yes, sir.

THE CLERK: Two sheets, J for Identification, same reference except "Chicago Cluster" instead of "Detroit Cluster."

THE COURT: What periods are involved?

THE CLERK: 12-31-61—69, same period, J for Identification.

(Two sheets, above-described, marked Defendant's Exhibit J for Identification.)

MR. GORING: In the event counsel for the Government think they need time I will attempt now to make the first attempt to reach Mr. Haffenreffer by phone.

THE COURT: Very well. We will take a recess.

(RECESS)

[559] MR. GORING: We found a busy telephone. We'll try again at the mid-morning recess.

Q. Now, I hand you these two papers which are Defendant' Exhibit I and J—

THE COURT: For Identification.

Q. (Continued)—for identification—

THE COURT: In fact, there are four papers involved, two in each exhibit.

MR. GORING: Two pages in each exhibit.

Q. (Continued) And Exhibit I for identification deals with Detroit; Exhibit J for identification deals with Chicago. I ask you to give us the information concerning the losses.

THE COURT: Concerning what, please?

MR. GORING: Concerning the losses.

THE COURT: Losses.

MR. GORING: Which you have testified to, generally, earlier. First in the Detroit area.

A. By years?

MR. GORING: Yes, you might as well do it by years.

THE WITNESS: The figures that I am giving you represent the losses to the company by years in the Detroit cluster. This includes the markets, well, there are about eight to ten markets around, what I call the Detroit [560] cluster, that is, the area covered by Detroit media, television or radio.

Q. And this is the area which you have previously referred to as the Detroit market?

A. Correct. In 1961, we showed a loss of $300,000, with the barrelage of about 58,000 barrels. '62, a loss of $577,000, a barrelage of 65,000 barrels. '63, a loss of 239,000 barrels, a barrelage—

THE COURT: You mean dollars?

A. (Continued) Dollars, I beg your pardon, barrelage approximately 36,000 barrels. In 1964, a loss of $128,000, barrelage 35,000 barrels. '65, loss $223,000, barrelage 30,000 barrels. 1966, loss $262,000 barrelage 17,000 barrels. 1967, loss $119,000, barrelage 95,000 barrels. 1969, loss $28,000, approximately 9,000 barrels.

MR. CODY: Your Honor, we object, first of all, because the witness has not testified about 1968, and, second of all, we object to everything after July 1965, as post-acquisition evidence. If it is to be admitted, I see no reason—

THE COURT: What was post-acquisition?

MR. CODY: Post-acquisition evidence, and I see no evidence, if its given, to see what weight the Court will give it. I don't know why 1968 should be omitted.

[561] THE WITNESS: I don't either. It's just an omission of some sort. We lost that year, too. I can tell you that.

MR. CODY: Object to accuracy.

THE COURT: Well, that objection certainly goes to the weight rather than admissibility.

Q. Now, give us the same information concerning the Chicago market.

A. Same years Chicago cluster again covers the areas around Chicago reached by Chicago media. '61—

Q. Now, there again is the same thing that you were talking about earlier in your testimony when you talked about Chicago market?

A. Correct. Again the figures that I am using are those figures after deduction or pro-rated home office expenses. 1961, profit $18,000, barrels 21,000 barrels. '62, profit $35,500, barrels 22,007. '63 profit $63,000, barrels 29,224. 1964, loss $20,000, barrels $35,500. '65, loss $153,000, barrels 71,000 barrels. '66, loss $216,000, barrels 62,000. '67, loss $390,000, barrels, 57,000, and here again 1968 figures are missing. I don't know why they weren't included. '69, loss approximately $500,000, barrels 77,800.

[562] Mr. Cody: Same objection, Your Honor, as we made to Defendant's Exhibit I for identification.

Mr. Goring: Have you ruled?

The Court: Objection noted, overruled.

Q. Now, you've given us the figures that appear on these two exhibits in round figures?

A. Yes, sir.

Mr. Goring: I'll offer these two exhibits which are now marked for identification as full exhibits, I and J.

Mr. Cody: Same objection.

The Court: Objection noted and overruled. I think the objection goes to the weight, rather than the admissibility as a proffered exhibit. They may be marked full exhibits.

(Defendant's Exhibit I & J marked in evidence as full exhibits)

[563] Q. You have mentioned the Arthur D. Little report which in this record is Government's Exhibit No. 10. Will you tell us some of the things which Arthur D. Little & Company recommended in that report, which you accepted and attempted to carry into effect?

A. The major recommendation, which we attempted in carry out, was the recommendation that Falstaff had to open more of the major metropolitan markets in the United States and move toward a national concept as a brewery, which meant on at least—the recommendation suggested opening Detroit and Chicago and Cleveland and

eventually moving into the eastern markets—Boston, New York, Philadelphia, Pittsburgh, et cetera.

They had some other recommendations in the report involving the construction of a new brewery. We did not agree that these could be acted upon without proper testing on a pilot plant basis anyway.

They had another recommendation to the effect that we should operate branches instead of distributorships. We felt this was too generalized. It had to be specifically applied to each market upon study.

Some of the areas—other areas that they had recommendations on involved investigation of processing operations to insure that we were keeping up with the [564] industry advancements and technology, substitution of can and bottle lines, et cetera. I have forgotten all there was. Various things they had in this report. The report was made in 1960. Much of it is outdated today.

Q. You did accept and try to carry out the recommendations concerning the Detroit and Chicago markets.

A. Yes, sir.

Q. And you have told us your experience in so doing.

A. That is right.

Q. You noted their suggestion that you build new breweries?

A. That is corect.

Q. And as far as New England was concerned, you rejected it.

A. Rejected it on the basis on which it was suggested. First of all, the size was too small in our opinion. Second, they were advocating some rather radical processes, such as outdoor fermentation tanks, outdoor storage tanks. We subsequently did test the latter to prove its worth, and we have also been testing outdoor fermenting tanks and have not been able to come up with a satisfactory design.

Carling's—I think it has been reported here—tested some rather far out processes in Fort Worth and finally had to abandon them. It was very difficult to operate a brewery process as one would a chemical process, which is different. And we would never go into any more—[565] any radical design without some thorough testing to be sure it did not have any effect on the product.

Q. Outside of the acquisition of Narragansett Brewing

Company did Falstaff ever acquire a going brewing concern?

A. By "going" you mean the brand was—

Q. I mean an operating concern with a brand.

A. No.

Q. How about Griesedieck Brothers?

A. At the time we acquired Griesedieck Brothers the brand was going downhill rather rapidly, and we needed extra capacity. And as soon as we had acquired the brewery we discontinued the brand to use the capacity for Falstaff.

Q. Did you use the distributor organization that Griesedieck Brothers had at the time?

A. No, we already had a distributor organization.

Q. Did you use Griesedieck Brothers personnel in the brewing process?

A. To a limited extent. Under the union rules of seniority, and that sort of thing, we had to work with some of the older personnel. It was a question of—

Q. As far as operations were concerned that was a going concern although you suggest it was not going well.

A. Correct.

Q. And all the other acquisitions up to the time you acquired [566] Narragansett were acquisitions of what, since they were not acquisitions, you say, of going brewing companies?

A. They were acquisitions of plants in what we considered to be strategic areas where we were already covering the market and they were acquired primarily for their capacity. In every case that I can recall the brands were either dying or dead, and we did not continue any of them.

Q. Were the breweries in those instances, other than Griesedieck and Narragansett, actually operating at the time you acquired them?

A. I think they were, yes. I am not sure of one. They may have been operating on a very reduced schedule at the point, but I presume they were operating.

Q. One, in fact, was in bankruptcy, was it not?

A. That is right.

Q. You told us, I think, that there was some suggestion coming either from Falstaff or from Dawson's that you interest yourself in the acquisition of Dawson's in Fall River. Am I correct?

THE COURT: Acquisition of what?

MR. GORING: Dawson's Brewing Company in Fall River.

A. The suggestion never came from us. I was contacted by Mr. Sam Brown, who at that time was the head of Dawson's—and I don't recall the year—in the early '60's—[567] asking whether we had an interest in Dawson's, and I said no.

Q. Why had you no interest in Dawson's?

A. Well, in the first place, the capacity of the brewery which is still—I still question the Blue Book value as it is rated. I still feel it is a smaller plant than they say it is. At any rate, it is an old plant. The brand is going downhill and the distributorship—the distributor organization, I should say, was a very poor one in our opinion.

Q. So as a business proposition you had no interest whatever in acquiring Dawson's, even though it was in the New England area.

A. That is right.

Q. There were a number of other smaller breweries in or near the New England area, were there not?

A. Yes, sir.

Q. Was there any suggestion made by any of them that you consider purchasing them?

A. The only one I can think of was the Diamond Spring Brewery in Massachusetts.

THE COURT: What was the name of it again?

THE WITNESS: Diamond Spring.

"A. (Continued) It is a very small brewery; I think less than 100,000 barrels capacity—and we had no interest whatever.

[568] Q. What about Stegmeier?

A. Stegmeier—I recall there was some inquiry made of me. Again I had no interest.

Q. You never explored it at all?

A. Never did.

Q. What about Standard-Rochester?

A. Again I was contacted by them. They were practically in bankruptcy at the time or about to be—or at least they have closed. As to bankruptcy, I don't know if they were. But here again the same problem: a small company, a small brewery, a very poor distributor organization cov-

ering an area that really wasn't the area we were primarily interested in—Buffalo, upstate New York.

Q. What about Hull—H-u-l-l?

A. No contact there. I don't even know anything about Hull.

Q. What about Genesee?

A. Genesee—At one time there was an expression of mutual interest. The brief discussion took place between myself and Mr. Wheli—I think it is W-h-e-l-i—which discussion really got noplace because their asking price in terms of the first approach anyway was so far out of reason in our opinion, we decided there could be no mutual interest.

Here again this brewery was serving upper New York State but to a much greater degree than Standard was, and [569] this was a successful brewery and had a very fine distributor organization. The principal interest we would have had would have been their coverage in parts of Pennsylvania, some parts of Ohio where they were beginning to be contiguous to our, at that point, eastern boundaries.

Q. Now with respect to any of these breweries which I have been discussing with you in the last several minutes, beginning with Dawson's, will you give me your opinion as to whether any one of them afforded a feasible means of pentrating the New England market?

A. I would say no for one of several reasons. In each case each one might be different. In one case it was the plant was too old or too small, or in another case it might be the distributorship was a failing one or a poor one, or a combination of those factors. None of these at any point in time did we consider approaching to open a New England market.

Q. Now with respect to the breweries of this group, including those who contacted you and those with whom there was no contact, did you have information about them sufficient to pass upon the acquisition of them?

A. I think we did, your Honor, I mean counsel.

Mr. Goring: Don't call me your Honor.

The Witness: Sorry.

[570] Mr. Cody: I will object to that, your Honor. The witness is being asked to testify as to his qualifications to pass upon these questions.

The Court: Which questions?

Mr. Cody: The fact as to whether these breweries were

adequate in order to enter New England. If he has an opinion, fine.

THE COURT: I think that is what Mr. Goring is trying to elicit, whether he had an opinion as to whether or not there would be a proper means for penetrating the New England market. Am I correct?

MR. CODY: Yes, but now he is asking the witness whether he thinks he is qualified to have that opinion.

Q. Did you personally have information enough, as chief executive officer of Falstaff, to pass upon the question whether any of these breweries afforded a feasible means of entering the New England market at that time?

MR. CODY: Same objection.

A. I did.

THE COURT: I don't know who else would if he didn't. He was acting for the Falstaff Corporation.

MR. GORING: I must say I can't bring a higher executive than the president here.

Q. Now the annual reports of Falstaff for the years 1965 to [571] 1969, inclusive, are in evidence here as Defendant's Exhibits A through D—through E. They are reports for which you, as chief executive officer, were in very substantial part responsible are they not?

A. Yes, sir.

Q. Without going into them in detail because the figures are all there, what do they show about the profit and loss situation in Falstaff, in the combined operations with Narragansett, and in the separate operations for those years in general terms?

THE COURT: And in what?

MR. GORING: Beg your pardon?

THE COURT. In Falstaff and—

MR. GORING: Falstaff individually, Narragansett individually, and the two in combination for those years, without going into detail.

MR. CODY: Object as to post-acquisition evidence, your Honor.

THE COURT: I understand that.

A. They show a deteriorating situation, a declining profit, for both Falstaff and Narragansett; in fact, in some years a loss for Narragansett. And the net effect is a de-

clined profit for the combination for that period you are referring to.

[572] Q. And what do they show about the volume of sales of Narragansett alone, Falstaff alone, and the two in combination in those years?

A. Again the same situation: a decline in sales in both areas; thus, a decline in the combination.

Q. I show you a copy of Defendant's Exhibit H, which is a graphic representation of New England barrel sales by brewers, 1964 to 1969, and ask you first to tell me how many brewers are represented in that market.

THE COURT: You are talking now about Defendant's H?

MR. GORING: That is correct, your Honor. New England barrel sales.

A. Ten on this list.

THE COURT: Ten.

Q. I suppose there is a number of small ones which are not included—

A. That is right.

Q. (Continued)—which would never get on the first line of the graph as far as quantity is concerned.

A. Correct.

Q. As a matter of fact, Falstaff is in that classification, is it not?

A. Right.

Q. You notice—

[573] MR. CODY: Same objection we made in the past.

THE COURT: Post-acquisition. Objection noted.

Q. You notice the change in the barrel sales upwards of a number of brewers. Will you give us the brewers with respect to which barrel sales show an increase in that period of time?

A. The greatest increase occurred for Anheuser-Busch. The next greatest rate of increase was shown by Schlitz.

THE COURT: Anheuser-Busch—

THE WITNESS. Schlitz.

THE COURT: Schlitz.

A. (Continued) Schaefer showed a gradual gain. Pabst and Miller—a slight increase through '68 and some slight decrease since then.

Q. What about Narragansett?

A. Narragansett shows a decline for the period.

Q. Are there other brewers that also show a decline in sales in that period?

A. Rheingold-Ruppert. It is one company: Rheingold-Ruppert.

THE COURT: What is that?

A. (Continued) Rheingold-Ruppert is one company as of '65. And that combination showed a decline. Carling's showed a slight decline. Ballantine, a decline, Piels, about even.

[574] Q. Do you know what the factors were in that market which caused these phenomena?

A. Primarily—

MR. CODY: Objection as to post-acquisition evidence, your Honor.

A. (Continued) Primarily the loss of the brands doing the more dominant share of the market, such as Rheingold and Ruppert, to the national brands, primarily Anheuser-Busch and Schlitz.

Q. For any particular reason?

[575] I think for the same reason it is happening in the other parts of the country; greater movement of society, young people with more money to spend, and the national brand image of these ten major brewers is a factor obviously. Many locations of on-premise accounts such as the airport bars, the better hotels, the finer clubs, these are the only brands sold today; the fact that the individuals travel more in the United States today than they have in the past and can get these brands anywhere in the country; the fact that historically they have been known as a higher-priced product which to some people indicate better quality; and the fact through price-promotion activities the public can often buy them at half or close to the local beer prices, thus giving the appearance of a bargain; the national advertising image of these brands, just a combination of many factors that in at least the last ten years have been showing a steady gain on the part of the national brands at the expense of many if not all of the regional and local breweries.

Q. Did I understand you to say the enticing packaging

of the leading brands had the effect of permitting the purchase of those beers close to the price of other beers?

A. Historically in the early years after the repeal of [576] prohibition there were really what were considered two price categories in the industry, historically the premium price and the so-called local price, in those days as much as a nickel a bottle or 20¢ a six-pack, and in those days which were prior to World War II I think the economy was such that that was a substantial difference to the average customer.

The period following World War II and the period of rationing during that time began to see an improvement for a period of a short while anyway of the national brand image. Then the Korean War came along; again we had a rationing period and a price-control period. After that period, the Korean War period, in the early '60s the total industry sales began to grow but the national brand sales grew at a much more rapid pace because at that time they had also followed some of our leads in locating plants in different parts of the country, thus enabling them to cut the freight and in many instances the price spread was narrow because these plants today are really much more efficient, enabling these brewers to—what I call—price promote.

In other words, they have periods of time when they will reduct the price for promotion of various types. In some instances the markets like Chicago, New York, [577] Boston, Detroit, to name a few, these prices will be at or lower than the local price, not for a permanent amount of time but for a period. In my opinion this combination of the lower price, a lower spread, I should say, between our brands brought out by our leads to raise prices where possible offset higher costs, and more efficient operations have narrowed the spread where today a nickel a six-pack doesn't mean anything to the average customer. And if you go on almost any campus today you find, as I found right here at Brown University, the kids are drinking the national brands. And when you ask them why, well, they don't want to drink a local beer, and that's a difficulty to overcome.

Q. In your opinion did the acquisition of Narragansett by Falstaff lead in any fashion to the competitive picture disclosed in Defendant's Exhibit H?

A. What is Defendant's Exhibit H?

Q. The graph in front of you.

THE COURT: Did the acquisition of Narragansett—

MR. GORING: Have any effect in producing the competitive situation disclosed by this graph.

A. I gather this would be my opinion only based on what historically has been happening throughout the country, but I would have to say in our opinion had we not [578] acquired Narragansett I think it would have followed the Rheingold curve rather than the curve it followed.

Q. Which means what?

A. Faster rate of decline.

THE COURT: It slowed down the rate of decline?

THE WITNESS: I believe it did, your Honor. Being able to support the brand, it is agreed, we feel was necessary which I'm sure the local brewer would not have done if it meant losing money which we were doing.

MR. CODY: Again, your Honor, this is only the witness' opinion.

THE COURT: That is why he is here, to give us his opinion, as well as the opinions of others.

Q. Do you recall a recommendation in the Arthur D. Little report which is Government's Exhibit No. 10 that you build a brewery in the Detroit area?

A. As I recall they recommended that we build one in the Detroit area, we build one in the Baltimore area, and we build one in southern California.

Q. Did you accept or reject those three particular recommendations?

A. The only one we accepted was the California area. We purchased property there, but then after a period of several years of declining sales in southern California we elected [579] to sell that property because we felt that our volume in that market would not ever justify a brewery of a million-barrel capacity.

Q. And you didn't build a brewery there?

A. That's correct.

Q. Nor do you propose to?

A. No, we do not.

Q. Wasn't there also the suggestion or recommendation in the Little Report that you plant some of your advertising heavily in the direction of potential female consumers?

A. Correct. That is one recommendation with which we did not agree.

Q. You rejected that?

A. Correct. I want the record to show we are not against females.

THE COURT: What's that?

THE WITNESS: We are not against females. I want the record to show that.

MR. GORING: I didn't think I needed to put that on the record. I felt it would probably be obvious. You may inquire.

MR. CODY: Your Honor, may I take two minutes to go over my notes?

THE COURT: In other words, you are asking for a [580] short recess; are you?

MR. CODY: Yes, your Honor. That may give Mr. Goring an opportunity to call Mr. Haffenreffer again.

THE COURT: We will take a short recess.

(RECESS)

[581] CROSS-EXAMINATION BY MR. CODY

Q. Mr. Griesedieck, Falstaff operates a brewery in New Orleans; is that correct?

A. Yes.

Q. And it did in 1964?

A. Yes.

Q. Does it ship from its New Orleans' brewery—

THE COURT: Does it—

Q. (Continued) Does it ship Falstaff Beer from its New Orleans' brewery to parts of Florida?

A. Yes.

Q. What parts of Florida?

A. Possibly all parts. I'm not sure.

THE COURT: What's that, please?

THE WITNESS: Possibly all part. I'm not positive just where it ships in Florida. It varies from time to time.

Q. What would be the furthest point?

A. Well, I suppose Miami.

Q. How far would that be?

A. I'd have to be estimating, but about 700 miles. I'm guessing.

THE COURT: About 700?

[582] THE WITNESS: I'm guessing. Without a map in front of me, Your Honor—

THE COURT: We don't want any guesses. We want your best—

THE WITNESS: Well, my best estimate would be about 700 miles.

Q. Could it be 800?

A. It could be.

Q. Is that shipped by truck?

A. Generally by rail.

Q. Falstaff also operates a brewery in Omaha, Nebraska, and did operate that brewery in 1964; did it not?

A. Yes.

Q. Did that brewery serve Cheyenne, Wyoming?

A. Yes.

Q. About how far, as far as you know, is Omaha, Nebraska from Cheyenne, Wyoming?

A. I really don't know, I'm sorry.

Q. What is the furthest point that that brewery ships to, or did ship to in 1964?

A. You mean in 1964, that year?

MR. CODY: Yes, sir.

THE WITNESS: Well, without access to records. I [583] couldn't be certain, but I would suspect that Denver or Cheyenne, you mentioned, Oklahoma, Tulsa, Oklahoma, Oklahoma City, these are normal, shipping markets, any one of these, whatever that distance is, I don't know offhand, but that is what the general range would be.

Q. Did it ship as far as 500 miles from the brewery?

A. I would suspect so.

Q. Possibly more?

A. Possibly.

MR. CODY: Excuse me, at this point, Your Honor, we could secure—

MR. GORING: I can't hear you, Mr. Cody.

MR. CODY: We could secure an Atlas and put that in evidence, or would the Court take judicial notice of the distances between various points?

THE COURT: I would not take judicial notice. I don't know and I wouldn't presume to take judicial notice.

MR. CODY: Very well, we'll seek to secure an Atlas and in that way establish the distances with precise accuracy.

THE COURT: Very well. I would have no objection to that procedure.

Q. Now, in 1964, did Falstaff operate a brewery in Fort [584] Wayne, Indiana?

A. I think so. I'm not sure of the dates when we acquired Fort Wayne. I think we were operating at that time.

MR. CODY: Well, I believe that's in the record.

Q. As of that date, would you tell me what areas that Falstaff Beer produced at the Fort Wayne, Indiana Brewery—

Mr. CODY: Withdrawn.

Q. As of 1964, would you tell me what markets were served by Falstaff with beer produced by it at its Fort Wayne, Indiana Brewery?

A. Well, it would serve the Indiana markets.

THE COURT: Indiana.

A. (Continued) Michigan, Chicago, Northern Illinois, Ohio markets that we were in, which was the Western Ohio markets, West Virginia, Virginia, some of Tennessee. I'm trying to visualize a map in my mind, possibly North Carolina and Georgia and South Carolina.

Q. Did it also ship into the District of Columbia?

A. That's right, what business we were doing there, which was limited.

Q. How about Maryland?

A. At that time I think we were shipping to Maryland through the military, yes.

[585] Q. But it was shipped from Fort Wayne, Indiana into Maryland?

A. Correct.

Q. After the acquisition by Falstaff of Narragansett, did Falstaff ship Falstaff Beer into New England from a brewery other than, or supply Falstaff Beer in New England from a brewery other than Narragansett?

A. Initially we shipped some beer in from Fort Wayne, while we—

MR. CODY: Thank you.

MR. GORING: I don't think the witness has completed his answer.

THE COURT: He hasn't completed his answer.

MR. CODY: I'm sorry.

A. (Continued)—while we were converting to the special package, special bottle at Narragansett.

Q. These shipments that we've been speaking of, are they mainly by rail, or exclusively shipments by rail, or are they also by truck?

A. Are you talking out of Fort Wayne?

MR. CODY: Yes.

THE WITNESS: Both. I'd say certain markets by trucks, certain markets by rail, the longer distance [586] markets by rail.

Q. Did you supply from Fort Wayne Falstaff Beer to Florida?

A. In that year? We have on occasion, yes. I can't remember whether it was true in 1964 or not.

Q. Well, let's take the period 1960 to 1964.

A. Again, I'd have to look at the record, but I would suppose we have, yes, because that plant is used when we are short in other plants.

Q. When you say you suppose you have, does that mean that's your best recollection?

A. That is my best recollection.

MR. CODY: Thank you.

Q. During the period 1960 to 1964, did Falstaff ship from Galveston, from the Galveston Brewery into Southern Massachusetts?

A. Not that I know of.

Q. After the acquisition of Narragansett, did Falstaff supply Southern Massachusetts with Falstaff product from its Galveston Brewery?

A. Unless it was a special package not produced anywhere else, I would not have thought so. I really don't recall.

Q. Did Falstaff supply, after the acquisition of Narra-

gansett, Falstaff product from St. Louis to Massachusetts?
[587] A. Again, I would not have thought so. Again, I'm not sure, but I'd have to look at the record.

THE COURT: This is from where, New Orleans?
MR. CODY: St. Louis, Your Honor, to Massachusetts.
THE COURT: St. Louis, yes.

Q. I draw your attention, Mr. Griesedieck, to a deposition of Alvin Griesedieck—

THE COURT: Deposition—
MR. CODY: Of Alvin Griesedieck, Jr., taken in St. Louis, Missouri, on May 2nd, 1967, and I will simply read this, perhaps, to refresh your recollection.

Q. Mr. Alvin Griesedieck, what office does he hold with Falstaff?
A. Not at the moment, he's resigned from the company.
Q. Pardon?
A. He has resigned from the company. He was, at one time, the Director of Marketing. In '67, when this deposition was taken, I don't recall what his title was, frankly. I think at that point he was Vice President head of Industrial Relations, as I remember.

THE COURT: First name is Alton?
THE WITNESS: Alvin, A-L-V-I-N, Alvin.

Q. On the third page of the deposition, Your Honor, Mr. [588] Alvin Griesedieck states he was Director of Marketing, Vice President and had held those position for about eight years. On Page 68 of that deposition Mr. Griesedieck was asked the following questions—question: "Do you know which other plants besides Fort Wayne have shipped into the South Eastern Massachusetts area in the period 1965-1966? Answer—

THE COURT: 1965?
MR. CODY: Hyphen 1966.
THE COURT: This is post-acquisition, was it not?
MR. CODY: Yes, Your Honor, as long as the defendant's put it in.
THE COURT: What's that?
MR. CODY: As long as the Defendant has put it in.
THE COURT: This was a question asked by Counsel for the Government in this deposition?

MR. CODY: Yes, Your Honor.

THE COURT: In other words, as to post-acquisition activities?

MR. CODY: Yes, Your Honor.

THE COURT: Very well.

Q. (Continued) "Answer: Yes. Question: Would you list them for me, please. Answer:—

[589] THE COURT: These shipments, again, were from what point, or is that specified?

MR. CODY: It will be specified in the answer, Your Honor. And this is into Southern Massachusetts.

Q. (Continued) "Answer: St. Louis, Plant 5; Galveston, Plant 8." Does that refresh your recollection as to whether or not St. Louis and Galveston, during that period, serviced Southern Massachusetts?

A. It may have been a tapper, I don't know. This package was shipped from other plants because we still don't have a tapper, T-A-P-P-E-R. This is the little keg that holds the equivalent of a case of beer. It's a little draft beer keg, and we opened the market initially with the tapper and had to be shipped from other plants. It still is being shipped from Fort Wayne at the present time, although, a new tapper line should be ready to go by the first of the year, but the line—we did not—could not justify the installation with the small volume we had and this may have been the package that was shipped.

I, frankly, don't recall that we shipped any other package than that out of St. Louis or Galveston.

Q. But, nevertheless, you did take Falstaff products produced in St. Louis and Galveston during this period [590] and ship it to South Eastern Massachusetts?

A. That is right. That's the only place we could produce it.

THE COURT: Only place you could product it. Is that your answer?

THE WITNESS: Yes, sir.

Q. You're familiar, of course, with the Miller's Brewing Company?

A. Yes.

Q. You consider them a national brewery?

A. Yes.

Q. How many breweries did Miller operate in 1964?

A. Best of my knowledge, one.

Q. Where was that located?

A. Milwaukee.

Q. They sold throughout the nation?

A. At a premium price.

Q. They sold throughout the nation?

A. That's correct.

Q. Do you normally, or does Falstaff normally attempt to pick up annual reports of its competitors either by—either from public sources, or by acquiring minimal amounts of shares in corporations?

[591] Mr. Goring: Again, I can't hear you, Mr. Cody.

Mr. Cody: I'm sorry.

Q. Does Falstaff attempt, generally, to acquire the annual reports of their competitors either by minimal stock investments, or from public sources?

A. Yes, those that are available.

Q. Have you studied any financial data as to Miller's?

A. Miller's reports are not published. It's a privately owned company by several members of the family, until it was sold to W. R. Grace and Company and subsequently it's since been sold to Philip Morris. Any figures that are published today by Grace, or were published by Grace, are published by Philip Morris which represents the combined operation of total companies. It doesn't separate out the Miller's Brewing figures.

[592] Q. In 1964 you have an idea whether Miller's was a successful operation or an unsuccessful operation?

A. I really don't know. We assumed it was successful. They never reported any earnings figures nor were there any available to see.

Q. Why did you assume it was successful, if I may ask?

A. Well, because we had a chance to see the figures back in '48. And at that time it would appear that if they had a certain barrelage at a certain price, they should be making money. That is the only assumption I could make—that is all—just on the barrelage they were selling.

Q. In 1964 they were still in business?

A. Correct.

Q. How do you explain, if you can, the fact that Miller's

was a national brewer but operated only one brewery in Milwaukee, Wisconsin?

A. The same was true of Schlitz and Budweiser several years prior to this. They only operated one brewery. They all started out on the basis of a one-brewery operation. They were selling throughout the country at a premium price which enabled them to pay the freight and still make the profit. Eventually all of them have decentralized, including Miller.

THE COURT: Decentralized?

[593] THE WITNESS: Yes, sir.

THE COURT: In other words, built other breweries?

THE WITNESS: Built or acquired them. In the case of Miller's they acquired two.

Q. But in 1964 it sold throughout the nation from one brewery.

A. Correct.

Q. In 1964 let's take a six-pack, an average six-pack of beer. What was the price Falstaff was charging, let's say, in Missouri—

THE COURT: 1964?

MR. CODY: In 1964.

Q. (Continued)—as opposed to what Miller was charging?

A. This will vary by states because of the state tax situation, but in the State of Missouri, which has a very low state tax,—it is the lowest in the United States so that theoretically it should be fairly representative—and I am going to have to just recall because '64 is six years ago. But you are talking about the price to the consumer in the store?

Q. Yes.

A. A six-pack of Falstaff cans in St. Louis would be at that point—I am guessing—recollecting as best I can—about 95 cents. A six-pack of Miller or Budweiser or Schlitz; they are all the same price.

[594] Q. Let's stay with Miller.

A. Stay with Miller. —would have been about $1.10.

Q. So, in other words, the beer that came from Milwaukee into St. Louis would run the consumer about 15 cents a six-pack more in 1964.

A. Anywhere from 10 to 15 cents. I can't remember exactly.

Q. Would you know offhand in 1964, in California, what the price differential would have been between a six-pack produced at one of your two California breweries; that is, one of Falstaff's two California breweries?

A. We only had one.

THE COURT: What?

THE WITNESS: We only had one in California.

Q. That was El Paso?

A. Well, that isn't California.

MR. CODY: I am sorry.

THE COURT: San Jose.

MR. CODY: San Jose.

THE WITNESS: San Jose.

Q. And the Miller price for the same six-pack out there at that time?

A. I think the spread would have been about the same. Again the state tax is different in California. We have a sales tax also out there.

[595] Q. You both pay the same tax. Right?

A. Not necessarily. The sales tax is a percentage. The excise tax would be a flat rate. But basically it would be about the same spread, perhaps 10 cents a six-pack—10, 15 cents.

Q. 10 cents a six-pack?

A. I can't tell you six years ago. I am presuming that is about what it was because it has been right around that for the last several years.

Q. When you say you presume, do you mean that is your best—

A. Best recollection.

Q. (Continued) —recollection. So it would be a 10-cents-a-six-pack spread between beer shipped from California and beer brewed in San Jose.

A. It would be a 10-cent spread between beer brewed in San Jose and beer brewed in San Francisco by Schlitz or Los Angeles by Budweiser—same price as Miller.

Q. The relationship between these brands that I have mentioned, Falstaff and Miller, and the price relationship

that I have mentioned on the retail level—would that more or less be the same on the wholesale level as well?

A. Yes, it should be; not exactly because the national brands give their wholesalers a slightly higher markup than we do.

Q. It would be pretty close, though.

[596] A. They say there is 10 cents a case difference in the markup, as a rule.

Q. How many cans in a case?

A. How many six-packs in a case? 24.

Q. That is 24 cans in a case?

A. That is right.

Q. But there is some correlation between the figures?

A. Yes.

Q. Do you happen to know how Miller happened to introduce its brands into New England and when?

MR. GORING: May I have—

A. No, I don't.

MR. GORING: I will back away.

Q. Do you happen to know when?

A. No.

Q. Are you generally familiar with Coors Brewing Company?

A. Yes.

THE COURT: Who, please?

MR. CODY: C-o-o-r-s, your Honor.

A. Headquartered in Golden, Colorado, a suburb of Denver.

THE COURT: G-o-l-d-e-n?

THE WITNESS: Correct.

Q. Were they a competitor of Falstaff in 1960?

A. In certain markets, yes.

[597] Q. Do you know what their sales territory was?

A. In 1960?

Q. Generally.

A. Generally I would say Colorado, Wyoming, New Mexico, Arizona, California, Western Kansas, parts of Oklahoma. I am not sure whether they were in the Pacific Northwest or not.

Q. Do you know if that sales territory changed any as of 1964?

[598] A. Not as of 1964, I don't know specifically, no.

Q. Has it expanded today?

A. Yes.

Q. To what?

A. In parts of Texas, a little more of Kansas, most of Oklahoma, and I suspect in Nevada. That's about it as far as I can tell, their market area.

Q. Would you consider Coors to be a regional brewer?

A. I would consider them to be a large regional or semi-national brewer.

Q. How many breweries do they operate?

A. One.

Q. In your expert opinion as one concerned with the industry and market, would you consider the corporation to be a success?

A. Yes.

Q. How do you explain Coors' ability to compete against national breweries and multiplant brewers such as Falstaff with success?

A. I wish I had the answer to that; so does everybody else in the industry. It is phenomenal in the industry, like Hershey Chocolate; little advertising, have got something, some charisma that has taken over the young people.

Q. As I understand, they do little advertising?

[599] A. Very little.

Q. What do you know about their distributors, if anything?

A. Good ones as far as I know.

Q. Are they exclusive by and large?

A. To some degree. They weren't originally but most of them are today, I think. I'm not sure of that. That again will vary by state. It depends on the volume they are doing in that market; such as our own case, we have some exclusive, some not exclusive. It depends on the market itself, the volume we are doing in the market, the type of market. If the distributor has to haul beer long distances generally you will have other brands. If it is a market in a metropolitan area such as where he is the dominant factor and operates a fleet of trucks at a profit, because of the nature of the delivery system—I should say the geography of the

area—then he'd be exclusive as we are, somewhat as Coors is and some others.

Q. In other words, their distributorship system is just about the same as everybody else's.

A. With the exception that they insist their distributors maintain their beer at a refrigerated temperature of about 60 degrees, so all their wholesalers have to install an air-conditioning system in their warehouses.

Q. Now, are you familiar with the Hamms Brewery Corporation?

[600] A. Yes.

Q. How many breweries did they operate in 1964?

A. Three, I think.

Q. Do you recall where they were?

A. Yes. Minneapolis, St. Paul—I think four. Minneapolis, St. Paul, San Francisco, Los Angeles and they leased a brewery in Houston. And they also purchased a brewery in the Baltimore area at some point along the time. They tried to open that market unsuccessfully and have since sold that brewery to Carling's, I think, and they have since dropped the lease on the brewery in Houston.

Q. Is Hamms what you might call a successful regional brewer?

A. Moderately.

Q. Now, Carling's in the 1964-1965 period, are you aware that they operated a brewery in New England?

A. Yes.

Q. And would you tell us where that brewery was located?

A. Natick, Massachusetts.

Q. Are you familiar with the way Carling entered that market?

A. Not exactly. It was prior to our looking at the market. By and large they—

Q. Excuse me. When did they?

A. I don't know. By and large their process of entering [601] the market was to come in and cut the price and just cut under everybody's price until they got established. Unfortunately this hurt their reputation to a degree.

THE COURT: Slower and a little louder please.

THE WITNESS: Unfortunately I feel that today they have

gained the reputation of being somewhat a cheap image in certain markets. Their sales have been relatively steady.

Q. However, they still have their breweries?

A. Among others, yes.

Q. And they built them?

A. That's right.

Q. Do you know if they were in the market before they built it?

A. I do not know.

Q. Do you know if they were in that market before 1964?

A. No, I don't recall when they opened the market.

Q. Can you tell us anything about the brewery that was built?

A. No, I have never been in it.

Q. Have you ever heard how much it cost?

A. No. I may have known at some time. I do not recall the figure.

Q. Do you know generally what the capacity of the brewery is?

A. No, I do not.

[602] Q. May I show you Defendant's Exhibit H and direct you to the graph representing Carling's sales. How would you characterize this?

A. A slight decline for the periods of '64 through '67 with a slight increase through '69. However, the '69 figures I must remind you have somewhat of a distortion because of the large strike activity that took place with the national brands in 1969 which artificially stimulated many of the local and regional brewers' sales.

Q. Do you consider Carling's to be a national or a regional?

A. To the degree that they are not in some of the metropolitan eastern markets such as New York, Pittsburgh or, to the best of my knowledge, Philadelphia, I would say they are a large regional; perhaps they are semi-national, somewhat in our category. However you describe us is how I would describe them.

Q. You are referring now to Carling's in the United States; is that correct?

A. Yes.

Q. Not the parent company?

A. Correct.

Q. Do you have even a general idea as to when the Carling Brewery was built in Natick?

A. No, I must admit I don't.

[603] THE COURT: I didn't get that question.

MR. CODY: I asked if he had even a general idea as to when the Carling Brewery was built in Natick.

THE WITNESS: I answered that I do not.

Q. Now, I believe you testified that Falstaff entered at one point or another the northern California market.

A. Yes.

Q. When was that?

A. About 1953 or '54.

Q. How did Falstaff enter that market?

A. By acquiring the Pacific Brewing and Maltine Company to produce a brand called Wieland's beer.

Q. You had not been in that market beforehand?

A. To the best of my knowledge, no.

Q. What was your closest market to that market at that time?

A. West Texas, New Mexico, possibly Denver. Again I am saying those are the areas I recall.

Q. So you went in cold?

A. In a sense that we acquired this other brewery, yes.

Q. Did you acquire a distributorship?

A. Yes.

A. Did you maintain them?

A. In most instances their distributors were primarily limited to northern California where we initially opened, [604] and to the best of my knowledge many of those distributors are still with us.

Q. Today?

A. Yes.

Q. The capacity of that brewery when you acquired it was about 200,000 barrels?

THE COURT: Are you speaking of the brewery in northern California?

MR. CODY: Yes, your Honor.

A. I think it was more than that. It seems to me it was closer to about 400,000.

"Q. In order to refresh your recollection, I show you Government's Exhibit 2 which are interrogatories and Answers to interrogatories proposed by defendants and the defendant's Answers to Interrogatories filed November 10, 1965.

MR. GORING: I suggest the witness should first be asked whether document he is being shown does in fact refresh his recollection.

MR. CODY: Yes, of course.

THE COURT: If it does not he can state it.

Q. The second paragraph.

A. Yes. It says here 200,000.

THE COURT: A little slower.

[605]. THE WITNESS: The figures quoted at the time of acquisition were 200,000 barrels, and after a remodeling job that was done in 1955 the capacity was raised by 150,000 barrels to 350,000. That is what I was referring to.

Q. But in 1952 when it was originally acquired, when you entered the northern California market cold, it was 200,000 barrels capacity?

A. Apparently so from that statement.

Q. Is that your best recollection?

A. I'm sure that is what it was. That was obviously taken from a record.

Q. I don't really want you to read from the document.

"A. Well, I'd have to recall it from that because I wouldn't have any other source.

"Q. Very well. Then you mentioned the capacity of the plant which was expanded.

A. That's right.

Q. And distributors acquired?

A. Right.

Q. They were retained for the most part?

A. Where they were good ones we retained them; where they were not we attempted to find others. I mentioned before I think that their business is primarily located in northern [606] California. They did not have any substantial distributors in southern California.

Q. For this brewery you paid less than $3,000,000?

A. That's right. Could I make one point about capacity which I think is important for the record?

THE COURT: What is that please?

THE WITNESS: I'd like to inform the Court of what we mean by the term "capacity," because I think it varies in different ways of interpretation. But basically when we talk about capacity we are talking about a seasonal capacity.

If you could sell as much beer in January as you do in July, then capacity of most of these plants would be substantially greater; but because beer is perishable it cannot be stored or inventories ahead of time for any period of time greater than maybe two weeks. It does mean that the plant capacity has to be of a size such as to enable one to ship in the peak months of July and August the maximum amount of beer demanded; thus, the capacity is partially unused in the other months.

Q. That would go for all breweries, Narragansett too?

A. Correct, except in our system in New Orleans was because of its location and the demand on the requirements that we were able to operate it at almost one hundred percent [607] all year round. That is the difference.

"Q. Now, the Pacific Brewing Company in 1952 in Northern California, what was done with the brand then being brewed by that brewery?

A. Wieland's beer?

"Q. Yes.

A. It was discontinued. Not immediately; I think within a six-month period or something like that.

Q. Now, surely you are familiar with Anheuser-Busch?

A. Too much so.

Q. Are you familiar with the fact they have built a brewery in New England?

A. Have built or are building?

Q. Are building.

A. I think it is about completed. In Merrimac, New Hampshire, that's correct.

Q. Do you have any idea what the price of that brewery is?

A. No, but generally speaking the statement has been made I think in the past by Anheuser-Busch in various trade publications to the effect that their costs have been running from 25 to $30 per barrel of capacity, and based on whatever capacity that brewery would have, and I think it's about 1,800,000 barrels, that would of course determine the price.

[608] The Court: What's that?

The Witness: Multiplying that times $30 a barrel would give you the cost figure. I think you are talking in terms—well, let's say close to 2,000,000 barrels. That's $60,000,000.

Q. Do you consider Anheuser-Busch to be a successful competitor?

A. The most successful.

Q. To what do you attribute this?

A. A combination of many things: image, No. 1 in the industry, the range of products in the various price categories, giving wholesalers a spread of products that enable them to stay exclusively a Busch Wholesaler; historic national reputation, in fact, world-wide for a fine product. All of it combined with a very aggressive market organization who were innovators in many new philosphies of the scientific market techniques, substantial capital which has enabled them to build the new modern plants.

However, in every case they were already in the marketplace when they built the plant. A combination of things. They have just had everything going for them.

Q. I assume you are familiar with Anheuser-Busch's growth.

A. Yes, very much so.

[690] Q. How did it get into these market places before they built a new plant?

A. They got into those market places before they built new plants by going at a premium price throughout the country, enabling them to go into a market as a higher-priced product, the so-called premium products. A person looking for something better, in his opinion it would cost more. He bought Anheuser-Bush's product.

Q. Did they ship in first?

A. Yes, years ago. I might point out that Anheuser-Busch was national prior to prohibition.

Q. Pardon?

A. Prior to prohibition they were a national brewer.

Q. But they didn't build all their plants at once?

A. They didn't build them, frankly, until after we pioneered the concept.

Q. That was when?

THE COURT: What?

THE WITNESS: I said they did not start the building program until after some of us, the rest of us had pioneered that concept.

"Q. That was then?

A. I don't recall—the first one was built in Newark I think in —

[610] Q. When did you pioneer your concept?

A. Oh, we started in 1935.

Q. They were a national at that time?

A. They were. They said we were foolish to try this, that we couldn't match the beer in different places.

Q. How may breweries did they have in 1935?

A. One.

Q. They were a national?

A. Yes, sir.

Q. Shipped throughout the nation?

A. Right.

Q. Now, at the time of the acquisition in 1965, the subject acquisition, you have testified other brewers and breweries serving New England existed.

THE COURT: At the time of the acquisition other breweries in New England existed?

MR. CODY: Existed.

A. That is correct.

[611] Q. They were all smaller in capacity than Narragansett; is that correct?

A. With the possible exception of Carling's, if that was in existence then. I'm not sure, but I don't think that was smaller, but other than that, yeah, I would have to say yes.

Q. Did you visit any brewery other than Narragansett in New England?

A. I've been to the Diamond Spring Brewery.

THE COURT: You did what, please?

THE WITNESS: The Diamond Sping Brewery, Dawson's; you limited this to New England now?

MR. CODY: Yes.

THE WITNESS: Those would be the only two.

Q. And when did you visit each?

A. Oh, I can't remember exact dates. I used to, as a matter of procedure, when I was in an area, I used to call on the brewery who was a friend, this sort of a busman's holiday, if you want to call it that. I've been through many breweries that we haven't any interest in, just interested in seeing what they're doing and what we're doing, and I can't recall exact dates. Prior to '65, I'm sure of that.

Q. You inspected the breweries?

[612] A. Not inspected them in terms of looking to buy them simply. In many cases we didn't any more than a cursory look at a part and plant, and some special feature they had. Generally speaking neither one of these visits was what I call an inspection of the brewery, no.

Q. So, prior to 1964, you're not thoroughly aware of the condition of these breweries?

A. One can take a quick glance at a brewery from just waling around the block and get a pretty, damn good idea of what its size and capabilities are, and in these cases, these are two, and one is an extremely small brewery and the other one is, frankly, rated bigger than it looks to me, but either one in my—you can tell by the state of the buildings, may things, without actually going inside.

Q. Wh[illegible] do you consider to be a small brewery?

A. Anything under a million barrels a day.

THE COURT: Under a million?

THE WITNESS; Yes. Right.

Q. What have you acquired over a million barrels?

A. Narragansett. In many cases we acquired under and build it up to over a million barrels.

Q. Yes, but the smallest didn't stop you from acquiring it; did it?

A. No, but we've since closed those under a million barrels.

[613] MR. CODY: Very well.

THE COURT: What?

THE WITNESS: They've since closed two under a million barrels and are thinking of closing another one.

MR. CODY: Very well.

Q. In 1933, the original Falstaff Brewery in St. Louis, Missouri, had about 100,000 barrel capacity; is that correct?

A. That's right.

Q. All right. In 1934, you acquired the Isle of Steiffel Union Brewing Company—well, it was leased.

A. Right.

Q. And that capacity was only about 250,000 barrels?

A. Correct.

Q. In 1935, you acquired the Krug, K-R-U-G, Brewery

in Omaha, Nebraska, and that capacity was only about 150,000 barrels.

A. Correct.

Q. In 1937, the National Brewing Company in New Orleans, the capacity was only about 140,000 barrels.

A. Correct.

Q. In 1948, the Columbia Brewing Company in St. Louis, capacity was about 500,000 barrels.

A. Correct.

[614] Q. As we've discussed, the Pacific Brewing and Malting Company in San Jose, in 1952, was acquired by Falstaff. Its capacity was only about 200,000 barrels.

A. Yes.

Q. In 1954, the Berghoff Brewing Company, Fort Wayne, had a capacity of 400,000 barrels when it was acquired by Falstaff.

A. I presume that's right. I haven't got the exact figure.

Q. The Galveston breweries which were acquired by Falstaff in 1956, had about the same capacity, 400,000 barrels, at the time of the acquisition?

A. Right.

Q. The Mitchell Brewing Company in El Paso, Texas, had a capacity of about 120,000 barrels at the time it was acquired.

A. Right.

THE COURT: When was it acquired?

MR. CODY: In—

THE WITNESS: It's about the same year as the plant in Galveston, I think.

THE COURT: '56?

THE WITNESS: Right around that time, Your Honor.

MR. CODY: (After checking) 1956, Your Honor.

[615] THE COURT: Very well.

Q. Now, all of these were small breweries; were they not?

A. Could I define for you our policy as existed in the period you're talking about on building? First of all, in 1933, '33, perhaps, prohibition conclusion, our company was a very small company and had practically no resources. In fact, much prior to the repeal of prohibition my father couldn't even borrow $5,000 from the bank of St. Louis to get us underway in 1933. We felt that the only way to grow and compete with those companies who had the resources

that the Buschs and Schlitzes had was to pioneer a new concept and decentralise operations. The product mix in those days was predominantly draft beer and returnable package beer, all of which had a very high freight cost because of the two-way freight factor, full and empty return.

We, thus, pioneered a policy of trying to find brewers who had re-opened after prohibition who had, as many did, jumped into what seemed to be a bonanza situation, and for various reasons had failed or were failing. We were thus able to buy these plants at a fraction of what it would have cost us to build a brewery.

As we were using these plants to produce Falstaff, [616] we were building around them in terms of expansion, and the only mistake we made in this period was the El Paso and Mitchell Plant, which did not lend itself to expansion, and thus was closed.

Today the problem in the industry is different. Today the predominant packages are the non-returnable packages, cans in one-way packages. Freight today is not the factor it was then. Today's speed of production and the new can and bottle lines are up in the neighborhood of 15 hundred units per minute, as compared in 1935 to 300 units per minute. As a result, today a brewery has to be able to utilize this capacity on a two-shift, five-day week operation and has to be closer to two million barrels in size to produce enough beer so that these two-bottle package lines will be operated most efficiently.

This was not true when we pioneered our thoughts on decentralization. Now our plant system today we have closed the St. Louis plant, both St. Louis plants referred to, as being too small. We've closed the El Passo plant. We are considering closing another small one because they don't lend themselves to expansion to the sizes that I'm referring to, and in the meantime, over a [617] period of time we have expanded New Orleans to over a likeness of a million barrels and Galveston to a million two, Fort Wayne to about a million, St. Louis about a million—that's the Griesedieck Brothers' plant—of course Narragansett had some changes made, but basically the capacity is about where it was when we purchased it, around a million three, or a million five, depending on how, you know, it rated in terms of its usage. The only two plants, Omaha was expanded to 700,000 barrels, and the only plant, really, that

has not been expanded to the size that I would consider optimal under today's condition, would be the San Jose Brewery, which is rated in today's market about 600,000 barrels.

Our position in California is such that we do not see how we could justify any major expansion on that market, or that plant at this time, but today no one is building a brewery under a million and a half barrels, that I know of, any new ones that have been announced, and if they have been, they've added to them in the next year.

Q. Mr. Griesedieck, are you aware that there have been a number of mergers and acquisitions within the brewing industry over the last 10 years?

A. Yes, sir.

[618] "Q. What would you say the results, in your opinion, of these mergers and acquisitions has been?

MR. GORING: I didn't get this question.

Q. What could you say the result in your own opinion, of these mergers and acquisitions is, or that's been?

MR. GORING: I object. The question is ambiguous. It may have several results, some of which are related to issues here, some which are not. I can't tell from the question what it really means.

THE COURT: I'm inclined to sustain the objection. It's quite a general question, it seems to me.

Q. Do you believe, Mr. Griesedieck, that these mergers and acquisitions have increased the sales of beer sold by, let's say, the top five sellers, that is, the percentage of total sales?

MR. GORING: I object.

MR. CODY: Withdrawn.

Q. Would you say that these mergers and acquisitions have resulted in the top five sellers of beer in the nation, getting a larger share of the market?

MR. GORING: I object. This question relates to the aggregate number of mergers, none of which we know anything about in detail.

THE COURT: I'll sustain the objection.

[619] MR. CODY: Your Honor, I notice it's almost 12:30. I think I might be able to use, if it's possible to adjourn now, five minuts early, I think it will facilitate my cross-examination.

THE COURT: We've lost considerable time this morning. I would like to move along as expediously as possible, but I'll yield to your request and we'll stop here until two o'clock.

MR. CODY: Thank you very much.

*RECESS*

[620]

*AFTERNOON SESSION*

*2:00 P.M.*

Q. (By Mr. Cody) To return for a minute, Mr. Griesedieck, to shipping—

THE COURT: Would you please keep your voice up so I can hear you?

MR. CODY: I am sorry.

Q. To return for a minute to shipping, what areas were served by the Falstaff Brewery in San Jose, California? And would you also tell me when that brewery was acquired and when it operated?

MR. GORING: Is your question: what areas are now served?

Q. (Continued) As of 1964.

A. The same basic areas in '64 as today. The brewery was acquired in 1952, and in 1964 to the best of my recollection we were shipping the following areas: Arizona—part of Arizona, Nevada and California, and Hawaii,—

Q. Hawaii?

A. (Continued)—and the Far East—Hawaii and the Far East for the military business. In other words, this business was shipped out of Oakland on military transport to Korea, Japan, Okinawa, Vietnam—in that general area as far as Guam.

[621] Q. Aside from the Far East did it also serve Alaska?

A. Yes. I don't think in '64 but it has since. It may have in 1964; I am not certain.

Q. You are not sure?

A. No, but it is serving Alaska today.

MR. CODY: Your Honor, at this time I would like to have

marked as Government's Exhibit 31 a chart which has been taken from a Rand-McNally Atlas, showing various mileage distances from various cities in the United States.

THE COURT: Have you seen it, Mr. Goring?

MR. GORING: I have no objection to that. If I should happen to find gross errors, which I doubt, I hope I will have an opportunity to correct it.

THE COURT: I can't hear you.

MR. GORING: If there are gross errors, which I doubt, I assume we can correct it by stipulation. Otherwise I have no objection.

THE COURT: Government's Exhibit 31.

MR. CODY: This only relates, your Honor, to the continental United States. It doesn't relate to Alaska and Hawaii.

THE COURT: Very well.

(United States Mileage Chart, derived from Rand-McNally Atlas, marked Government's Exhibit No. 31)

[622] Q. By the way, Mr. Griesedieck, how is the Falstaff beer shipped to Alaska; by what method?

A. By boat.

THE COURT: Boat.

A. (Continued) Ship, I presume you would say.

Q. Yes; shipped or transported.

A. Right.

Q. Mr. Griesedieck, you testified this morning concerning the Detroit cluster and defined that as a market, and you testified concerning the period 1961 through 1969. I notice in—

MR. CODY: Withdrawn.

Q. Do you believe that advertising has any effect on a corporation's success in selling beer?

A. Certainly it has some effect. It depends on whether it is a new product or a new market or what the strength of the advertising is or—there are so many; it is pretty hard to generalize on that sort of question other than to say yes, it has some effect.

Q. Your advertising in 1961, I notice from Defendant's Exhibit for identification J,—I am sorry, full Exhibit J—was $56,000 and $53 in 1961; $61,000 and $416 in 1962, but that by 1969 this advertising had dropped to $7136. It had

dropped steadily from 1964 on. Now if advertising is [623] an important factor in selling beer, how did you expect to sell more beer while cutting your advertising?

A. Didn't expect to.

Q. On the other hand, Mr. Griesedieck,—

Mr. Cody: From what I believe is Exhibit I, your Honor.

The Court: Is it or isn't it?

Mr. Cody: My previous question had relation to Exhibit I, Detroit.

Q. I now direct myself to Exhibit J entitled "Income Statement, Chicago Cluster, 12 Months Ended 12/31/61 through 1969." It would appear from the exhibit, Mr. Griesedieck, would it not, that Falstaff's sales in Chicago increased through 1961 to 1969?

A. I don't have it in front of me, but as I remember reading it this morning, that is correct. However, there is a difference between those market situations.

Q. With respect to the advertising expenditures on Defendant's Exhibit J, would you please tell me if there is any trend in the increase of advertising which you can foresee?

A. It is obvious that from the period in 1965 we decided to expend substantially more in this Chicago cluster. The difference is that in Detroit after—I think I testified the other day we had two distributor changes in that market during the period '61 through '64 and that we then [624] determined that without proper distribution we would be foolish to spend a substantial advertising budget because it wouldn't do any good if we didn't have the beer available for the public to buy.

In Chicago we elected to spend a substantial amount in '65 in the attempt to build the business in Chicago because we believed that our distributor system there was such that at that point of time we did have sufficient distribution to make it worthwhile to take that gamble. Up to now so far we have still lost more so we are building the business but at a loss.

[625] Q. In other words, you went to Chicago and you increased advertising expenditures and you won sales; is that right?

A. Right.

Q. In Detroit you decreased advertising expenditures and you lost sales; right?

A. Only after we lost distribution.

Q. But you did decrease advertising?

A. Yes, but there are three legs to the stool. There is advertising, there is distribution and there is the product. You have to have all three there.

Q. But you decreased advertising expenditures?

A. Yes.

Q. Did you lose sales?

A. Not as a result of decreasing advertising.

Q. How do you know that?

A. Because we have the history of other markets at the same time. There is no point in spending money in the market to advertise the product if the beer is not available for the public to purchase, and we did not have proper distribution in Detroit for the periods I am talking about. So we elected to cut back on this market until such time as we would get the distribution.

Q. Tell me, is advertising related to distribution?

[626] A. In some ways, yes.

Q. How?

A. The distributor of course has to feel that he has to have support to be able to open the market; to hold the market somebody has to handle your brand. If we were able to find distributors we could have convinced them. There was nobody to convince.

Q. Do you think in Detroit in 1964 that an expenditure of $33,000 was enough to attract the distributor?

A. No.

THE COURT: You mean the expenditure for advertising?

MR. CODY: Yes, your Honor.

THE WITNESS: Are you sure that is all we spent?

Q. I hand you Defendant's Exhibit J.

MR. CODY: The witness has Defendant's Exhibit J before him.

A. Actually, the amount of advertising we spent in Detroit cluster was approximately $100,000. If you will notice the figure there, cluster advertising and division selling and advertising, these two figures have to be combined to get the total figure.

Q. You felt that was enough to attract a distributor?

A. Not enough to attract a distributor. We felt we had

to have a distributor before we could commit ourselves to the cluster.

[627] Q. Now, directing your attention, Mr. Griesedieck, to the second page—

THE COURT: What exhibit?

MR. CODY: Defendant's Exhibit J.

A. That is for Chicago.

Q. Yes, sir, which reads "Falstaff Brewing Corporation and Subsidiaries—Income Statement, Detroit Cluster."

A. Sorry. I thought we were on Chicago.

Q. I'm sorry, we are on J.

A. Yes, Detroit.

THE COURT: What is that again now?

MR. CODY: Defendant's Exhibit J, your Honor.

THE WITNESS: That is Chicago, "I" is Detroit.

Q. Very well. There is somewhat of a confusion here.

A. This is marked "I", Detroit, and "J", Chicago.

Q. "I" is Detroit and "J" is Chicago. Directing your attention to Defendant's Exhibit I relating to the Detroit market—

THE COURT: What is that again?

MR. CODY: Directing the witness' attention to Exhibit I.

THE COURT: Is that Detroit or Chicago?

THE WITNESS: "I" is Detroit, your Honor, and "J" is Chicago.

[628] Q. On the second page of that exhibit there is an item entitled "Pro-rated Expenditures." May we know what that means?

A. I think I explained this morning that there are certain expenses involved in our executive offices in St. Louis; my salary, the salaries of the other executives, the office rental, clerks, staff, other items of overhead, if you wish to call it that, fees, many things. These are allocated to the various markets on a pro-rata basis, based on the barrelage contributions of those markets to the total barrelage sold by the company.

Q. But it is not really an expense incurred by that particular or in that particular market?

A. No, but it wasn't charged to that market, but it would be chargeable initially to some other.

Q. Accounting sheets?

A. That's right. It still is a process of doing business.

[629] Q. And that would be the same for Exhibit J?

A. It would be the same for Exhibit J. It would be the same for St. Louis, or any other market, each one would bear a share of the total.

Q. But if we were to take that away from the Detroit cluster, or Chicago cluster, the loss would be lower or the profit higher?

A. Yes, but, then, conversely the loss would be greater, or the profit less in the other markets to which it would have to be charged.

Q. Would you say, Mr. Griesedieck, from your experience in the brewing industry that a distributor expects a brewer to spend money on his distributorship and his distributing activities in order to make money?

A. Yes. I might even add further, that Falstaff was one of the first brewers to develop what we call a distributor contract agreement in which both parties agreed to do certain things. One of the conditions that the brewery agrees to do is to produce a quality product and make it available at the lowest, possible price, and to adequately support that product in the marketplace. The distributor agrees to get distribution, to agree to promote and handle credit, deliver the product and [630] many other facets. These are generalizations. These are spelled out in more detail in our agreement.

Q. Getting back to Chicago and Detroit, as markets which were opened by Falstaff, is it your opinion that a brewing corporation entering such a market must spend money in advertising to support the distributors in that market?

A. Yes.

Q. Going back, Mr. Griesedieck, to Falstaff's initial negotiations with Narragansett, they began in about 1961?

A. The initial contact that I refer to the other day, was around that time, yes.

Q. Do you recall that Falstaff formulated a price that they were willing to pay for Narragansett at that time?

A. No, I don't think so, because we didn't really know what we were buying at that time. We were not able to really get a good look at any of their figures in detail, nor

did we have a chance to look at the plant. It was just a first shot at a do-you-have-an interest-type thing.

Q. Do you have any idea what you were considering paying for Narragansett at that time?

A. Well, if you—as I recall, they based it on so much per barrel capacity, because without any look at the balance [631] sheet or, in other words, if we were buying the total company, we were acquiring in addition to capacity, cash, accounts payable, accounts receivable, other assets and other liabilities, any debts, et cetera, all of which obviously is a factor in the total price paid. If we were simply buying the physical assets of the company, the plant only, then, that would have been a different proposition and, then, we would have had to guesstimate what we thought it was worth to us.

Q. Was there a guesstimate made at that time?

A. I don't recall.

Q. Mr. Griesedieck—

Mr. Cody: I would ask now to mark for identification Plaintiff's Exhibit 27, taken during depositions of this action bearing Government's identification Nos. 1-37, 1-38. It is dated February 5, 1962.

The Court: What does it purport to be?

Mr. Cody: It is a report made by Falstaff Brewing Corporation, Your Honor.

The Court: It's a what?

Mr. Cody: It's a report.

The Court: Report made by Falstaff?

Mr. Cody: Correct, Your Honor.

The Court: Dated what?

[632] Mr. Cody: February 5, 1962.

Mr. Goring: May I ask if that is one of the documents designated by the Government?

The Court: Is it, Mr. Cody?

Mr. Cody: The documents designated by the Government, Your Honor and we're checking on that right now. I don't believe that it is, but, nevertheless, the documents designated by the Government were designated for use in the Government's direct case. This is the document from the defendant. They have had it for years and were fully aware that we have had the document.

The Court: You say it's been introduced somewhere along the line as an exhibit?

MR. CODY: In a deposition, Your Honor.

THE COURT: Deposition of discovery?

MR. CODY: Yes, Your Honor.

THE COURT: Show it to Mr. Goring.

(Mr. Cody handing document to Mr. Goring)

MR. GORING: The problem here is a little deeper than that. Both the Government and the defendants designated, under a pre-trial order, documents they would rely upon in the case in chief. Now, this is not such a [633] document. I take it Mr. Cody is saying that he did not rely and does not now rely upon it in his case in chief. If, however, he relies upon it in rebuttal, I have no objection to it being identified, but I want to make sure that no examination upon it occurs, unless it is proper cross-examination and I'm sure it is not.

MR. CODY: I propose to use the document, Your Honor, to refresh the witness's recollection.

MR. GORING: On a subject which I recall was not the subject of direct examination.

MR. CODY: Well, I think the original negotiations between Falstaff and Narragansett is certainly a subject of direct examination.

MR. GORING: Not the price aspect of it.

MR. CODY: Yes, and I so represent to the Court.

THE COURT: I think it was—there was considerable interrogation with respect to this first approach and the price as well. Well, you want this marked?

MR. CODY: For identification.

THE COURT: As Exhibit—what will that be, Mr. Clerk?

THE CLERK: 32 for identification.

THE COURT: 32 for identification.

[634] This report bears a date of February 5, 1962?

THE CLERK: Yes, Your Honor.

MR. CODY: Correct, Your Honor.

THE COURT: Very well.

(Report dated February 5, 1962, marked as Plaintiff's Exhibit 32 for identification)

Q. Mr. Griesedieck, I show you Exhibit—Government's Exhibit 32 for identification and I ask you if this refreshes your recollection as to what price, in 1962, Falstaff was considering paying for the Narragansett Brewery in Warwick?

THE COURT: What?

MR. GORING: I object on the ground that this was not the subject of direct examination.

[635] THE COURT: Where did you locate that, in Warwick?

MR. CODY: Warwick, Rhode Island, your Honor, yes; Narragansett.

THE COURT: Warwick, Rhode Island? I never heard of a Narragansett Brewery in Warwick, Rhode Island.

MR. CODY: Cranston. I am sorry, your Honor.

THE COURT: It would be Cranston. They are two different places.

MR. CODY: I have got my violations mixed up.

A. This memorandum is—

MR. GORING: Has there been a ruling on my objection?

THE COURT: What is that again?

MR. GORING: Has there been a ruling on my objection to the use of this?

THE COURT: (To the reporter) I believe Mr. Goring made an objection to the question concerning this report of February 5, 1962. Would you give us that objection again?

(Objection read by reporter as follows: "I object on the ground that this was not the subject of direct examination.")

THE COURT: That is the basis of the objection?

THE REPORTER. Yes.

THE COURT: Did I rule on that objection?

[636] THE REPORTER: No, you didn't.

THE COURT: It seems to me, Mr. Goring, if my recollection serves me right, there has been some testimony by this witness in regard to the determination of the purchase price to be paid for Narragansett. It must have been in his direct examination.

Is my recollection correct?

MR. GORING: Your recollection as far as any mention of price is concerned is incorrect.

MR. CODY: I refer, your Honor, to page 116 of the transcript.

THE COURT: Page 116 of the transcript?

MR. CODY: Yes, your Honor.

THE COURT: When was that, yesterday?

MR. CODY: Yes, your Honor.

THE COURT: Would you read what appears on page 116?

MR. CODY: Second paragraph. The witness stated:

"We discussed the matter. Mr. Maloney indicated that since figures were not public, he would have to advise us about what their asking price might be or their interest, but was not at liberty to show us the figures."

We submit, your Honor, that this document indicates what the asking price or at least what the offering price was.

[637] MR. GORING: The next sentence in that answer on the same page reads this way:

"After that meeting he came back to us and indicated that he though the price tag would be in such-and-such a range • • •"

THE COURT: Would what, please?

MR. GORING: "• • • he thought the price tag would be in such-and-such a range • • • "

—that is the way the answer reads—

"• • • and I can't recall what that was."

MR. CODY: We are simply trying to refresh the witness' recollection as to what that range was.

MR. GORING: Trying to refesh the witness' recollection on cross-examination of something that was not the subject of direct examination has no propriety about it at all.

THE COURT: I don't think we are going to impose any hard and fast limits to the scope of cross-examination here, Mr. Goring. There is no jury here. If the document refreshes the recollection of the witness, I am inclined to allow it.

MR. GORING: In that case, Mr. Cody, may I have a copy of it?

MR. CODY: Yes.

[638] (A pause)

THE COURT: Now you have shown the document to the witness. I didn't get his answer if any answer was given.

MR. CODY: I wanted Mr Goring to refresh himself.

MR. GORING: The Government has no copy for me to hold while this is going on, so they would allow me to handle the exhibit itself.

THE WITNESS: I would like to have it if I am going to be asked questions about it.

THE COURT: What is that again?

THE WITNESS: I would like to have it to read if I am going to be asked questions about it as soon as Mr. Goring has finished looking at it.

THE COURT: I think you are entitled to that consideration certainly.

MR. GORING: I would like to have a copy of that when you can get it for me.

MR. CODY: We will have a copy made during the recess, your Honor, for defense counsel.

MR. GORING: Tomorrow morning will be satisfactory.

I hand the witness back Government's Exhibit 32 for identification.

THE WITNESS: You asked me a question. Would you repeat it again?

[639] Q. (Continued) Mr. Griesedieck, does that refresh your recollection as to how much Falstaff was willing in 1962 to pay for the Narragansett Brewing Corporation?

A. I would say it refreshes my memory as to what took place at the meeting, not necessarily as to what we were willing to pay because this doesn't say that we were willing to pay anything. It simply says in the best opinion of Mr. Maloney what he thought Narragansett was willing to take, if I interpret this correctly.

Q. Do you recall at that time what Narragansett was willing to take?

A. Mr. Maloney made the statement in here that based on an average earning figure of about $443,000 annually over a four-year period that he thought they might be willing to take, if I quote it here,—let me just first of all summarize the figures. Narragansett's November 30, 1961 net worth, approximately $10 million less $2 million cash which they would keep left a difference of approximately $8 million. Then there are some calculations here if we gave them a certain number, 170,000 shares of Falstaff which had a value on the market at that time of $40 per share, showed a figure of $6,800,000, leaving a gap of approximately one million, two—or, as it specifically shows here, $1,155,000. He then made the statement that [640] if this gap were closed by about one million, three, he would recommend acceptance by Haffenreffer.

This meeting was held between Messrs. Maloney of Hem-

phill, Noyes, Mr. Bill O'Connor, who was at that time comptroller of Narragansett, and Mr. Karl Vollmer who at that time was Vice President of Planning, I think, for Falstaff. I was not present. The statement says:

"The above narrows the negotiation field should we be interested."

Presumably this was written by Mr. Vollmer. He says:

"I told them we were considering some other possible acquisitions and that we would not be able to determine at this time which one held the most interest for us."

So we at no time at this point advised them we were making any offer of any kind. This seemed to be what Mr. Hemphill—Mr. Maloney, rather, felt he could recommend to Mr. Haffenreffer. Whether Mr. Haffenreffer would have accepted, I don't know. The one concern I had, however, was a declining profit factor between 1959 when they hit a peak of $700,000 roughly after taxes; 1960, $380,000; 1961, $236,000; 1958, which I should have started—I am sorry—$437,000 or a four-year average of $443,000.

But the thing that concerned me was that without a [641] better look at the whole picture this decline for the last three years certainly didn't look like it was holding any four-year average at that rate and certainly we were not interested in probing this unless they were willing to expose all the facts, which they were not willing to do at that point, unless we were willing to come up and say we have a definite interest in going further, not just looking into—a sort of searching expedition. At that point in time we were beginning to talk to Rheingold and we therefore just dropped the whole thing.

[642] Q. Does this document that I have just shown to you, Government's Exhibit 32, refresh your recollection as to what Falstaff was considering paying for Narragansett in 1962?

A. I don't—I want to state again the document does not reflect what we were willing to pay. It reflects what he, Mr. Maloney, felt he could recommend to the owners of Narragansett as a satisfactory price.

Q. That would be about 6.8 million?

A. No. As I indicated there, he felt that that gap had to

be narrowed closer to their net worth less their cash, or roughly eight million.

Q. Eight Million?

A. But we didn't know at the time if we would get the eight million.

Q. Mr. Maloney at the time was employed by who again?

A. He was a partner in the brokerage—the New York brokerage firm of Hemphill-Noyes which later became Hemphill, Noyes, Hornblower-Weeks.

Q. And he represented Narragansett?

A. That's right.

Q. He didn't represent Falstaff?

A. No.

Q. Mr. Griesedieck, do you ever recall an attempt on the [643] part of Falstaff management to borrow money to finance the building of a new brewery?

A. Yes, we have talked to that point several times.

Q. With who?

A. Kidder-Peabody, at least two members of our own board who are members of investing banking firms, Mr. John Hayward of the St. Louis firm of Rheingold & Gardiner, a Mr. Donald Arrowsmith of the New York firm of VanAlstyne, Noles & Company.

Q. Let me put it this way: Building a new brewery in an area which was to serve in part perhaps an area where you are not presently selling?

A. Yes. We hired Kidder-Peabody, for example, to probe the possibility of financing a 2,000,000-barrel brewery in the southeastern part of the United States to enable us to ship to the Florida market you mentioned earlier, Georgia, Carolina markets from a closer point because shipping them from Fort Wayne and New Orlenas is too expensive. We actually were losing money in Miami because of the freight costs. Kidder-Peabody indicated to us that based on the analysis which they and we have made it would be foolish for us to spend our money and their time or our own attempting to raise $50,000,000 that we estimated we needed for this project because [644] the present climate of our own earnings and the picture in the brewery industry were such that nobody would loan money on the basis of facts and figures on a return investment basis.

Q. What year was this?

A. This was last year.

Q. Referring to your testimony on page 117 in this action—

THE COURT: This is the transcript now of these proceedings which have been before me for the last week?

MR CODY: Yes, your Honor.

THE COURT: The testimony of this case?

MR. CODY: Yes, your Honor.

Q. The fourth answer down. The question you were asked was: "Those negotiations, "meaning the Narragansett negotiations, "obviously were resumed at some point. How did that occur?" The answer was: "When the Rheingold merger was terminated because another party stepped in and bought it, frankly, while we were still looking, we then were I think again contacted by Mr. Maloney after it was made public that our negotiations with Rhengold were terminated."

Are you absolutely sure somebody bought Rheingold or did Rheingold buy somebody else?

A. Absolutely sure nobody but Rheingold. It was Pepsi Cola [645] or United Bottling, somebody like that.

MR. CODY: I hesitate to ask the court, your Honor, but may we have a very brief recess so that I may review my notes? I believe I am through with the cross-examination of the witness. However, I would like to check through my documents just to make absolutely sure.

THE COURT: Verywell, we will take a short recess.

(RECESS)

MR. CODY: We have no further questions, your Honor.

MR. GORING: That is all, Mr. Griesedieck. You may head for your plane.

THE WITNESS: Thank you.

MR. GORING: If the Court please, as I think you have been told, Mr. Haffenreffer will be ready to take the stand at 10:00 o'clock tomorrow morning, and with his testimony the defendants expect to close their case.

THE COURT: Under the circumstances I suppose we have no alternative but to stop here. He will be your last witness?

MR. GORING: Unless something very strange and impossi-

ble for me to figure arrives at the meantime, he will be the last witness.

THE COURT: Very well. Then we will of necessity stop here until 10:00 o'clock tomorrow morning.

(ADJOURNED at 3:00 p.m.)

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE
DISTRICT OF RHODE ISLAND

| | |
|---|---|
| UNITED STATES OF AMERICA<br>*v.*<br>FALSTAFF BREWING CORPORATION | C.A. No. 3523 |

Before his Honor, Chief Judge Day
Wednesday, October 14, 1970

APPEARANCES:

For the Government:

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Bruce Repetto, Esq.
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Department of Justice
Antitrust Division

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*VOL. IV*

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[648] *SIXTH DAY*

*WEDNESDAY, OCTOBER 14, 1970*

*10:04 A.M.*

THE COURT: Mr. Goring?

MR. GORING: Your Honor—Mr. Haffenreffer.

CARL WILHELM HAFFENREFFER, Sworn

DIRECT EXAMINATION BY MR. GORING

Q. Mr. Haffenreffer, where do you live?

A. I live in Little Compton, Rhode Island.

Q. How old are you?

A. 65.

Q. Were you prior to mid-1965 an officer of Narragansett Brewing Company?

A. I was.

Q. And at that time just prior to the acquisition what office did you hold?

A. Executive vice president and director of marketing.

Q. You graduated from Dartmouth College?

A. That is correct.

Q. Did you continue to graduate school?

A. Yes.

Q. Where?

A. Amos Tuck School of Business.

[649] Q. Beg your pardon?

A. Amos Tuck School.

Q. You have a degree from there?

A. No, I have not.

Q. How long were you connected with Narragansett Brewing Company?

A. Actively since, I think, 1943 or '4.

Q. Will you tell me what your business experience with that company was from there on?

A. I was advertising—assistant advertising manager and then went to assistant marketing and marketing manager, and director.

Q. Beg your pardon?

A. And a director. And—Prior to 1965, this is? Yes, that is as far as I went.

Q. You and your family had stockholdings in Narragansett Brewing Company?

A. Yes, we did.

Q. And that was true immediately prior to the acquisition?

A. Yes, it was.

Q. And had been for a long period of time?

A. Yes, it had.

Q. Were they substantial?

A. Yes.

[650] Q. What members of your family besides yourself were stockholder in Narragansett?

A. Well, my brother and his children and my children and me.

Q. What office did your brother hold in the company?

A. He was president and chairman of the board at the time of the acquisition.

Q. For how long a time prior to 1965 had you held those offices?

A. Since 1954.

Q. And for how long a period of time had you held the office of director and executive vice president?

A. Well, roughly—and only roughly—I would say 8 to 10 years.

Q. There came a time on doubt when management of Narragansett had in mind disposing of it.

A. Yes.

Q. When did management reach the conclusion that it ought to be disposed of, roughly?

A. We started—We started to explore the possibility of disposing of it in, I would think, 1956 or '7.

Q. Will you tell me what your reasons for believing that was a sound thing to do were?

A. Well, we had, we thought, three options. One was to acquire other breweries to become—in order that we [651] might become a more important force in the industry, or we should merge with other companies and become part of a coalition of breweries, or we should be acquired and become part of a larger unit that was then in existence.

Mr. Gorno: Does your Honor have any difficulty in hearing the witness?

THE COURT: No. I have a little difficulty drawing the distinction between the second course of action and the third. I understood the second to be to merge with others in the brewing business.

MR. GORING: Merge with others.

THE COURT: What was the third?

MR. GORING: The third was to be acquired.

Q. Will you tell me what were the reasons which prompted you to view this move as desirable?

A. Well, there were two at least and not mutually exclusive. It was our opinion that as the brewing industry was growing at that time, unless a unit in the industry had sufficient breadth of territory and volume they would not be able to compete successfully in the market. And the other consideration was that a great deal of the family resources were in the brewing basket, so to speak, and we thought that that was not a healthy condition particularly in view of the projection—prognosis that we had developed as far as the industry was concerned. It was at that point that we started to explore other possibilities, [652] ways to go.

Q. Tell me what your prognosis of the future of Narragansett was at that time.

A. I think back in 1958 or '59, whatever the actual date was, we were quite definite in our convictions that unless we could broaden our base, unless we could break out of the New England market so to speak, because we had Canada at the North and the Atlantic coast on the east and south, that we were going to be chocked off by the larger breweries who had wider distribution.

The high cost of marketing and the high cost of maintaining brewing facilities indicated that we should have had 2-, 3,000,000 barrels of production in capacity and sales in order to really survive and have a viable operation.

Q. In those years and the years between then and 1964, tell me what the competitive situation was in New England.

A. As best as I can recall, five years ago Narragansett in total was the leader with particular strength in the States of Maine, Rhode Island, of course, Massachusetts, and probably we were not the leader in Connecticut or Vermont. But in the other states we were; we had a significant lead.

Q. What kind of price competition did you encounter in the New England area in those years?

[653] A. Well, it was competitive. There were those who were cutting prices, but the major force was the fact that they were not—that the larger breweries were not raising their prices as costs increased, labor and material costs increased, with the result there was a price squeeze on our brewery.

Q. Who were the brewers who were in that fashion putting the price squeeze on you and others?

A. The so-called national breweries, Budweiser, Schlitz, Pabst. Not so much Pabst but Budweiser and Schlitz and Ballentine.

Q. What did you see ahead of you in those years with respect to price competition in the future?

A. Well, the only way we could make our dividends and profit was through economy in operation and production, and therefore we set aboutimproving our production processes to reduce labor costs. And at the same time we were hunting for other breweries that we might buy to join with in one way or another.

Q. In the first contacts which were had between Falstaff and Narragansett did Falstaff approach you or otherwise?

A. No. I believe we were the aggressor in that instance. We asked our representatives to contact Falstaff.

[654] Q. And that we are told, as far as this record is concerned, is somewhere in the area of 1961.

A. I would think that was about right, yes.

Q. Those negotiations were dropped, I understand.

A. Yes.

Q. And do you remember about what year?

A. I would think the same year they started. It didn't last very long.

Q. They were renewed later?

A. Yes, they were.

Q. Did Falstaff approach you or did you approach them?

A. I don't believe I know because it occurred between two individuals at a happening—at a meeting that was not planned in New York, and they met each other. I don't know who was the aggressor at that point.

Q. And the two people who met each other at this occasion in New York, who were they?

A. Mr. William Maloney of Hemphill-Noyes, at that time Hemphill-Noyes, and Mr. Griesedieck of Falstaff.

Q. And did you get intothe negotiations at that time?
A. Not immediately, no.
Q. That would have been, so I am informed, about 1964?
A. Yes.
Q. And those negotiations proved fruitful?
[655] "A. Yes, they did.
Q. And the acquisition occurred in mid-1965?
A. Yes.
Q. Now, on the basis of your experience in the industry will you tell me what an outsider trying to penetrate the New England market needed to have?
A. We thought that they, first of all, needed a plant to produce the product within 200 miles of the market because of the high cost of transportation. They needed either their own distribution system or a wholesale distribution system to market their product in the markets.
Q. What have you to say about the feasibility of an outsider coming in and creating a distribution organization?
A. It would have been very difficult if not impossible. If they tried to create one of existing wholesale distributors I don't believe it would have been possible.
Q. What have you to say about the feasibility of an outsider coming in and building a brewery in New England?
A. Building a brewery without having the visible—the proper methods of distribution, building a brewery of capacity that I would have thought would be necessary to break even, nothing less than a million barrels, would have been a tremendous expense, and I don't believe it could have survived.
[656] Q. Now, in the years preceding the acquisition I take it you knew something about Falstaff Brewing?
A. Yes.
Q. Did you know how close they were to the New England market?
A. I don't believe they were close at all. No, I don't know exactly. I think they were to the west. I don't believe they were much out of Ohio or Michigan as far as I can recall it, and to the south. I don't know whether they were in Virginia or Washington prior to acquiring Narragansett or just after it, but they were in Washington and I think Virginia and from there south.

Q. In general you were familiar with the brewing industry?

A. Yes.

Q. And your immediate competition?

A. Yes.

Q. And any threatened competition?

A. We tried to be, yes.

Q. What have you to say about the presence of Falstaff in Ohio on the west and in Washington and/or Richmond, Virginia, on the south? What have you to say about the competitive effect of their presence there and no closer to New England?

A. They were no threat. We certainly didn't consider them any threat to us. We had much greater threats to concern [657] ourselves with. Certainly at that distance they were no threat because of the transportation costs.

Q. You knew, of course—I say "of course;" it is really a question. Did you know whether they had distribution facilities of any kind in New England?

A. I knew they didn't.

[658] Q. Did you meet Falstaff—did Narragansett meet Falstaff in competition anywhere?

A. Nowhere.

Q. Falstaff was not, I take it, selling in New England?

A. They were not selling in New England.

Q. Narragansett was not selling outside New England in any significant quantity?

A. In no significant quantity, right.

Q. Did it ever occur to you in the years preceding 1961, that Falstaff would attempt to penetrate the New England market on its own?

A. On its own, no.

Q. Now, after the acquisition, you remained for a period of time in an official position with Narragansett Brewing Company?

A. I did.

Q. And after the acquisition, Narragansett was a wholly owned subsidiary of Falstaff?

A. It was.

Q. How long did you remain in the official capacity with Narragansett after 1965?

A. Until May or July of '68, I believe.

Q. In what capacity in those years?

[659] "A. President and I really don't recall the other titles, Coordinator of Sales and Marketing in collaboration with Falstaff.

Q. Did you in those several years hold any official position with Falstaff?

A. I was a Director.

Q. Do you know what breweries in New England, or what brewers who sold in New England went out of business in recent years?

MR. REPETTO: Your Honor, I'd like to object to the post-acquisition evidence as to the structure of the market, or the behavior of the firms in that market, and if I could make that a continuing objection, it would safe me interrupting the witness's testimony.

THE COURT: The objection is noted. I think frankly—overruled. I think the objection goes rather to the weight than the relevancy, so I'll allow it.

MR. GORING: Would you read the question, please.

(Pending question read by reporter)

THE COURT: By recent years you mean what period?

MR. GORING: Well, let's say the period of 1961 and the time you left Narragansett.

A. If—

[660] THE COURT: That would be '61 and '68; is that correct?

MR. GORING: That is correct.

A. (Continued) If I can recall, the Haffenreffer Company was acquired by the Narragansett Brewing Company prior to the acquisition, that went out of business, as far as that operation was concerned. I believe the Dawson Brewery in New Bedford was purchased—acquired by the Ruppert Brewery or the Liebmann Brewery of New York. I don't know of any others, offhand.

Q. How about Diamond Spring?

A. I believe Diamond Spring has only recently gone out of business, at least after 1968.

Q. How about Pickwick?

A. Pickwick and Haffenreffer Company are the same.

Q. Were you aware before the acquisition of Narragansett by Falstaff whether Anheuser-Busch had plans to build a brewery in New England?

A. I don't think I was aware that they had definite plans, no. I think my awareness came after the acquisition, while I was still employed by Falstaff.

Q. To what extent was Narragansett, prior to the acquisition, a publicly owned company?

[661] THE COURT: Prior, this is prior to purchase?

MR. GORING: Prior to acquisition.

THE COURT: To acquisition, I'm sorry.

A. I believe that the 15 percent of the stock might have, at the outside, might have been held by others, and the Haffenreffer family and their interest, and the Moeller family of New Haven had their interest.

Q. You say 15 percent?

A. Fifteen, one-five.

Q. So that 85 percent was held by members of the Haffenreffer, you and your brother and your children and his and who else did you say?

A. The Moeller family, M-O-E-L-L-E-R family in New Haven.

Q. So the members of the Haffenreffer family, whom you've mentioned, and the mention of the Moeller family taken together had controlling interest in substantial amount?

A. That is correct. Yes.

MR. GORING: You may inquire.

CROSS-EXAMINATION BY MR. REPETTO

"Q. Mr. Haffenreffer, you've testified that there were three options that you had starting in 1956-57, one of which was to acquire another brewery to become a more important force. The second option was to merge to more or less become a more important force and the third was [662] being acquired; have I characterized your testimony correctly?

A. You have.

Q. From the period 1956 to 1964, what efforts did you make to acquire other breweries?

A. Well, without specific regard to the first date, which I am—

THE COURT: What's that first—

A. (Continued) Without regard for the first date, I don't know what happened prior to 1956, but—

Q. 1956 to 1964.

A. Well, this might have happened—some of the events might have happened prior to 1956, I don't know. We started first by the acquisition of Croft Brewery in Boston. We then acquired the Hanley Brewery, at least their trademarks, trade signs, et cetera, in Rhode Island. We then acquired the Kruger Brewing Company trademarks, trade signs, et cetera, from New Jersey, that with the hope of breaking out of New England. We had discussions with National Premium Brewery, I believe it's name is, in Baltimore. We had a brief discussion with the Genesse Brewery in Roschester. We were part of 10 breweries nationally that had plans to merge as one brewery to have a common brand.

[663] Q. I am discussing now merely the first option which is to acquire another brewery.

A. Well, the Genesee Brewery was the last.

Q. So until 1964 substantial efforts had been made by Narragansett to acquire another brewery.

A. They had.

Q. And to become a more important force in its market.

A. Yes.

Q. Did it become a more important force in its market?

A. It did not.

Q. In 1964 was Narragansett the leading brewer in New England?

A. In total, yes.

Q. Between the years 1960 and 1965 was Narragansett a growing company?

A. Yes, we were.

Q. In the years 1960 to 1965 was Narragansett constantly expanding the capacity of its brewery?

A. We were.

THE COURT: In 1960 to 1965?

MR. REPETTO: Yes, your Honor.

Q. In the year 1963 what would you characterize as a fair price for Narragansett?

THE COURT: Fair price?

MR. REPETTO: Yes.

[664] MR. GORING: I object.

THE COURT: What is the objection?

MR. GORING: I suggest it is irrelevant.

THE COURT: What is the relevancy of this line of inquiry?

MR. REPETTO: We had testimony yesterday from Mr. Griesedieck concerning what was offered initially for the Narragansett Brewery in 1961. That seemed to be somewhat in dispute at the end of yesterday.

I am trying to clear it up through this witness as to the possible price being offered or discussed in the earlier negotiations.

THE COURT: That isn't the question that Mr. Goring objected to. The question Mr. Goring objected to, as I understand it, was what was the fair price for Narragansett in 1963.

MR. REPETTO: I will change that to 1962 or 1961 since that is also somewhat in dispute.

Q. I will say 1961. What did you consider to be a fair price for Narragansett?

MR. GORING: I still object on the ground that the answer will be irrelevant, whatever it may be.

THE COURT: Frankly, I don't see the relevancy of it. Granted there may be some general testimony of this nature [665] in the record, that doesn't make it relevant. Many times we do get considerable irrelevant material in the record.

MR. REPETTO: Your Honor, there are two issues raised by the defense, one of which is that Narragansett itself was going downhill. If there was a significant change in the price being offered in 1961 and 1965, that could mean one of two things. It could mean, number (1), that Falstaff considered Narragansett to be a very viable brewer, a brewer that had made substantial gains in the period 1961 to 1965, so that it would offer substantially more in the latter year. Or it could mean—which is another issue in the case—that Falstaff had a significant interest in this market to the point where they were willing to offer almost double for a company that was in the market over a four-year period.

MR. GORING: If the Court please, I direct your attention to the fact that on the present state of the testimony we are told that Falstafff did not in 1961 or 1962 make any offer to Narragansett.

THE COURT: What about that?

MR. REPETTO: We also have in evidence that prices were discussed. That was the subject of Mr. Griesedieck's testimony yesterday concerning Government's Exhibit 32 for identification which did mention a price at that time.

[666] MR. GORING: That description of the record is a little off the mark. Mr. Griesedieck in cross-examination, and with reference to Exhibit 32, told us that Mr. Maloney reconstructed or constructed a figure which he represented to Mr. Griesedieck would be his recommendation to Narragansett. There was nothing said about any discussion of price on the part of Falstaff and no offer was then made.

MR. REPETTO: It would, however, your Honor, clear up the fact whether Mr. Maloney was correct in his assumption that it would have some sway with Narragansett. Mr. Maloney has been testified to as being an agent of Narragansett Company.

THE COURT: Granted that to be so, aren't we straying from the issue of whether or not any specific offer was made in 1961? Your question assumed that such an offer was made. And I understood Mr. Goring to take issue with you on that as far as the record here is concerned.

MR. REPETTO: "Offer," your Honor, could have legal connotations.

THE COURT: What is that?

MR. REPETTO: "Offer" could have legal connotations. I am not suggesting there was a formal legal offer as we understand it in contracts. I am suggesting, however, that figures were discussed as to the possible price of [667] Narragansett. And we do not contend that a formal offer was submitted to Narragansett.

THE COURT: Certainly the witness wasn't there at any such conference, was he? Is that what you refer to?

MR. REPETTO: That we don't know at the present time.

THE COURT: The record up to know indicates the conference was between Mr. Maloney and some representative of Falstaff.

MR. REPETTO: There is nothing in the record to show whether Mr. Griesedieck or either of the Messrs. Haffenreffer were in contact.

THE COURT: You may ask Mr. Haffenreffer if there was any such conference in 1961.

Q. Mr. Haffenreffer, did you contact Mr. Griesedieck in 1961 concerning the sale of Narragansett to Falstaff?

A. Yes.

Q. Was any round ballpark figure descussed between you and Mr. Griesedieck or a representative of Falstaff in and around that time?

A. No.

Q. Did Narragansett—

MR. REPETTO: I withdraw that.

Q. In and around the year 1961 did you have discussions with Mr. Maloney as to his interpretations of what Falstaff was [668] willing to offer for Narragansett?

MR. GORING: I object.

THE COURT: On what ground?

MR. GORING: The ground that he is asking for testimony which could only come from Mr Maloney, not from this witness.

MR. CODY: All he asked, your Honor, was whether there was a conversation or not.

THE COURT: I don't propose to let him go into the details of the conversation. Whether or not there was a discussion between him and Maloney about price—to that extent I will allow it.

A. Yes.

MR. REPETTO: I am just trying to clarify the question and answer.

Q. There was contact with Mr. Maloney, and the subject of the conversation had to do with what Falstaff would be willing to pay for Narragansett.

A. No.

Q. A round ballpark figure.

A. No.

Q. In the years 1960 to 1964 how would you characterize the New England beer market in terms of whether it was rural, urban, mixture, or what outstanding characteristics along [669] that line did it have?

A. I don't believe I can characterize the New England market precisely.

Q. Would you say it was more or less the same as other markets in the country?

A. More or less.

Q. Would you say that a new entrant to this market

would have difficulty in getting TV time if he were willing to pay for it?

A. No, I don't think so.

Q. He would not have difficulty?

A. He would not have difficulty.

Q. In the years 1960 to 1965 did Narragansett ever change a distributor, replace one with another?

A. I believe we have, yes.

THE COURT: Is that in 1965?

MR. REPETTO: In the years 1960 to 1965.

THE COURT: A five-year period.

A. My answer is yes, we must have. I don't recall the specifics.

Q. Do you recall how Narragansett went about changing a distributor?

A. Well, we looked for a stronger distributor when we wanted one, particularly outside of New England.

[670] THE COURT: What is that, please?

THE WITNESS: We looked for stronger distribution facilities, particularly when we went outside of New England.

Q. When you were within New England how would you go about securing a stronger distributor if you were dissatisfied with the one that you had?

A. Offering the line—the Narragansett line of brands which were many, and trying to induce him to take us on, particularly if he had a weaker brand at the present time.

Q. So there is somewhat competition for distributors.

A. Minor, yes.

Q. Minor competition for distributors?

A. Yes.

Q. In the years 1960 to 1965 did Narragansett have written agreements with their distributors that they were to distribute the Narragansett brand only?

A. No.

Q. To your knowledge did any distributors in those years—

MR. REPETTO: Excuse me.

Q. To your knowledge did any brewer in those years have such written agreements?

A. Not to my knowledge.

Q. Consequently there was no binding written agreement holding [671] a distributor to a brewer?

A. Not to my knowledge.

Q. Do you know when and how Schlitz Brewing Company entered New England?

A. I do not.

Q. Do you know when and how Carling's Brewing Company entered New England?

A. I did not get the name of the brewery.

Q. Carling.

A. Carling. Yes, I do.

Q. How did they do that?

A. They came into Waltham and Natick and built a brewery.

Q. Do you know when and how Anheuser-Busch Company came into New England?

A. I do not.

Q. Do you know when and how the Pabst Brewing Company came into New England?

A. I do not.

Q. Do you know the cost of the Carling Brewery in New England?

A. I did but I don't.

Q. When Falstaff introduced its brand after the acquisition did it introduce a product by the name of Tapper—T-a-p-p-e-r?

A. A product by the name of Tapper?

[672] Q. Tapper Keg.

A. Yes, it did.

Q. Was that successful?

A. No.

Q. Was it successful anywhere in the United States?

A. No.

Q. Did Falstaff lose a great deal of money because of the introduction of this?

A. I don't know.

Q. I am going to read from Defendant's Exhibit E, 1969 annual report covering the year's operation for 1969.

THE COURT: 1969?

Q. Page 3:

"In 1968 extraordinary charges relating principally to the breakdown of aluminum Tapper containers pro-

duced a net loss for the year of $861,313.00 or 19 cents per share."

THE COURT: Eight hundred what? What is that again?
MR. REPETTO: $861,313.00.
THE COURT: For—what else did you add there?
MR. REPETTO: "or 19 cents per share."

Q. (Continued) From your experience as director in 1968—realizing that you had left the company in 1968—would you say that was a fair statement in the annual report that [673] this loss was principally due to the Tapper? Was it that big a money-losing proposition?

A. Yes, it—yes. May I qualify it? It was not the only cause of the loss.

Q. I realize that, but it is stated in the annual report principally through the Tapper. This would indicate losses by Falstaff were not due solely to increased competition but perhaps by a marketing error.

[674] MR. GORING: I move that comment be stricken. It is not a question.

THE COURT: I don't think it is a question, frankly. It may be stricken.

Q. But your testimony is that Falstaff sought to introduce this type of tapper into New England and was unsuccessful in doing so?

A. Yes.

MR. REPETTO: Your Honor, we were going to request a recess of ten minutes after the questioning of this witness to have a conference concerning rebuttal. I wonder if I may request that we have a ten-minute recess at the present time so that we could come back and ask or settle those issues, whether there are any questions left for this witness and as to our rebuttal.

THE COURT: Do you want to say something, Mr. Cody?

MR. CODY: Yes, your Honor. The ten minutes will give us an opportunity to determine whether we have any more questions of this witness and whether in fact we wish to put on any rebuttal.

THE COURT: We will take a ten-minute recess at this point.

(RECESS)

[675] (After recess)

CARL W. HAFFENREFFER, Resumed

MR. REPETTO: No further questions, your Honor.

REDIRECT-EXAMINATION BY MR. GORING

Q. Was there a time, Mr. Haffenreffer, when Carling expressed an interest in acquiring Narragansett?

A. Yes, there was.

Q. Do you remember when that was?

A. Yes, it was early on—after the re-legalization of beer, I believe it was in the late 1940's or early fifties.

Q. Did anything come of it?

A. No.

Q. Are you familiar with the performance of Carling since its entry into New England?

A. I am familiar up through '68, yes.

Q. Tell me very briefly, were they successful or not?

A. They were not successful.

MR. GORING: That's all.

RECROSS-EXAMINATION BY MR. REPETTO

Q. Mr. Haffenreffer, does Carling still sell beer in New England?

A. I believe they do.

Q. Do you know the amount of money that they have lost?

A. As of today? No.

[676] Q. You know how much money they have gained?

A. No.

Q. Are you familiar with their finances?

A. As of now?

Q. Of now, or any period after they entered?

A. Yes, I was quite familiar with finances up until my departure.

THE COURT: What's that?

THE WITNESS: I was very familiar up until my departure from the brewing industry.

THE COURT: That would be in 1968?

THE WITNESS: Yes.

Q. Do you have a profit and loss figure in 1968?

A. No, I do not.

MR. REPETTO: No further questions.

MR. GORING: That's all, Mr. Haffenreffer. Defendant rests, Your Honor.

THE COURT: Very well.

MR. CODY: The Government has no rebuttal, Your Honor.

THE COURT: No rebuttal. Very well.

MR. GORING: I have discussed with the Government the timetable of filing and exchanging briefs, which I [677] think is a procedure which Your Honor will entertain. Mrs. Archambault tells me that the transcript from the beginning of the case, the opening of the defendant's case, will be in our hands no later than Friday of next week.

THE COURT: Friday of next week. That will be—

MR. GORING: October 23rd. Now, the Government and I have discussed this and join in the suggestion that briefs be filed and exchanged on or before November 24th, oral argument thereafter at Your Honor's pleasure.

THE COURT: On or before November 24th?

MR. GORING: 27th, oral arguments thereafter at Your Honor's pleasure.

MR. CODY: Your Honor, if I might, I would like to mention one thing, Mr. Goring addresses himself solely to the question of briefs. I would also like to include findings of fact, proposed finding of fact and conclusions of law. I assume the Court would wish this.

THE COURT: It would be of assistance to the Court, certainly.

MR. CODY: In that case, Your Honor, we might need 45 days from October 23rd, which would be—

THE COURT: December 10 or thereabouts, December 15th.

MR. CODY: December 10; would that be it?

[678] THE COURT: It would be very close to it. Make it December 15th if you wish.

MR. CODY: We can make it December 11th, Your Honor, which would be a Friday.

MR. GORING: I'm altogether willing to do anything that the Government suggests as far as dating is concerned.

MR. CODY: Does Your Honor expect both parties to file a proposed findings of fact and conclusions of law?

THE COURT: I think you should, certainly, from your viewpoint. Well, that's understood, gentlemen. The Court wishes to commend counsel in the expeditious matter that

this case was tried. I had visions of it lasting much longer and I'm grateful to counsel for the manner in which they've conducted this trial.

If you give me good and thorough briefs, I may well want oral arguments after I have had a chance to consider them. Well, am I correct, gentlemen, did you want to file your briefs and your proposed findings of fact and conclusions on law at one and the same time, or was it your idea to file the briefs first and then the proposed findings and conclusions later?

MR. CODY: I would think, Your Honor, at the same time would be most logical.

[679] THE COURT: Well, I understand that the earlier date of November 17th is no longer at stand?

MR. GORING: I understand that, Your Honor.

THE COURT: And we'll have in hand the briefs and the proposed findings, et cetera, no later than December 11th.

MR. GORING: I would assume that any suggestion, findings and facts and conclusions of law would properly be a portion of the brief.

THE COURT: I think they will. Very well. We'll recess, then, pending further demands on us.

*ADJOURNED*

GX-1

## UNITED STATES DISTRICT COURT
## DISTRICT OF RHODE ISLAND

| | |
|---|---|
| UNITED STATES OF AMERICA, PLAINTIFF, v. FALSTAFF BREWING CORPORATION, DEFENDANT. | Civil Action No. 3523<br>*STIPULATION*<br>Filed: 12/23/69 |

Subject to the right of each party to object to the introduction of any of the following facts into evidence on the grounds of relevancy or materiality, the parties by their respective attorneys herein solely for the purposes of the within action hereby stipulate as follows:

1. The beer sales, in terms of 31 gallon barrels, annual percentage changes in sales and ranks of the brewing companies listed in Exhibits A through M attached hereto were as designated therein during each of the years shown.

2. The total beer sales, in terms of 31 gallon barrels, in the United States listed in Exhibit N attached hereto was as designated therein during each of the years shown.

3. The beer sales, in terms of 31 gallon barrels, and market share percentages listed in Exhibits O through Z attached hereto were as designated therein for each listed company in each listed state during each of the years shown.

4. The following persons held the positions stated with the defendant for the period indicated:

| *Name* | *Title* | *Date* |
|---|---|---|
| Joseph Griesedieck | President | 1953 to date |
| Harvey Beffa, Sr. | Chairman, Board of Directors | 1961 to date |
| | Executive Vice President | 1963 to 1968 |
| Karl Vollmer | Vice President—Planning | 1960 to 1967 |
| | Director of Marketing | 1950 to 1960 |
| J. Howard Wemhoener | Vice President — Finance | 1964 to 1968 |
| | Comptroller and Treasurer | From at least 1955 to 1964 |

| *Name* | *Title* | *Date* |
|---|---|---|
| Ford Gutting | Special Project Coordinator | 1958 to 1967 |
| Charles Dependahl | General Marketing Manager | 1964 to date |
| | General Sales Manager | From at least 1960 to 1964 |

| *Name* | *Title* | *Date* |
|---|---|---|
| Alvin Griesedieck, Jr. | Vice Pesident—Marketing | 1960 to 1968 |
| | Advertising director | From at least 1958 to 1969 |

The following persons held the positions stated with the Narragansett Brewing Company for the period indicated.

| | | |
|---|---|---|
| C. W. Haffenreffer | Executive Vice President and Director of Marketing | 1948 to 1968 |
| R. F. Haffenreffer, III | President | From at least 1960 to 1967 |
| William P. Considine | General Sales Manager | From at least 1960 to 1967 |

5. The production and sale of beer is a line of commerce within the meaning of Section 7 of the Clayton Act.

6. The New England states—Maine, New-Hampshire, Vermont, Massachusetts, Connecticut and Rhode Island—taken together constitute a section of the country under Section 7 of the Clayton Act and a relevant market.

7. In 1964 Narragansett Brewing Company sold the following six brands of beer in the geographic areas indicated:

| *Brands* | *Geographic Sales Areas* |
|---|---|
| Narragansett | New England |
| Croft | Massachusetts, Rhode Island |
| Hanley | Rhode Island |
| Krueger | New England, New York, New Jersey, Virginia, Maryland, Delaware, Florida, District of Columbia |
| Ambassador | Newark, New Jersey |
| Haffenreffer | Massachusetts |

8. In 1965, the following brewers, among others, oper-

ated breweries with the capacities and at the locations set forth below and sold beer produced at these breweries in areas of New England and in areas of the State of New York.

| *Brewer* | *Location* | *Normal Annual Productive Capacity (In terms of 31 gallon barrels)* |
|---|---|---|
| Hull Brewing Co. | New Haven, Connecticut | 100,000 bbls. |
| Dawson's Brewery, Inc. | New Bedford, Massachusetts | 750,000 bbls. |
| Standard Rochester Brewing Co., Inc. | Rochester, New York | 500,000 bbls. |
| The West End Brewing Co. | Utica, New York | 800,000 bbls. |

9. In 1965, the following brewers, among others, operated breweries with the capacities and at the locations set forth below and sold beer produced at these breweries in areas of the State of New York.

| *Brewer* | *Location* | *Normal Annual Productive Capacity (In terms of 31 gallon barrels)* |
|---|---|---|
| Hedrick Brewing Co., Inc. | Albany, New York | 150,000 bbls. |
| International Breweries, Inc. (Iroquois-Phoenix Div.) | Buffalo, New York | — |
| The William Simon Brewery | Buffalo, New York | 250,000 bbls. |
| Fred Koch Brewery, Inc. | Dunkirk, New York | 105,000 bbls. |
| Utica Brewing Co., Inc. | Utica, New York | 100,000 bbls. |

10. In 1965, the following brewers, among others, operated breweries with the capacities and at the locations set

forth below and sold beer produced at these breweries in areas of New England.

| *Brewer* | *Location* | *Normal Annual Productive Capacity (In terms of 31 gallon barrels)* |
|---|---|---|
| Diamond Spring Brewery, Inc. | Lawrence Massachusetts | 100,000 bbls. |
| Hampden-Harvard, Division of Piels, Bros., Inc. | Willimansett Massachusetts | 400,000 bbls. |

11. Since 1935, the number of brewing companies and breweries has declined. As of July 1, 1935, 663 brewers operated 684 breweries. In 1952, 307 brewers operated 334 breweries. As of July 1, 1957, 229 brewers operated 255 breweries. As of July 1, 1964, 144 brewers operated 190 breweries. As of July 1, 1965, 140 brewers operated 178 breweries.

12. Since 1935, the number of brewing companies operating breweries in New England has also declined. As of July 1, 1935 there were 32 brewers operating breweries in New England. In 1957 there were 11 brewers operating breweries in New England. In 1964, there were six brewers operating breweries in New England.

13. Per capita beer consumption in the United States increased from 10.3 gallons in 1935 to 15.6 gallons in 1964.

14. In 1964, only three of the top ten sellers of beer in the nation were not selling in New England. They were the defendant, Theo. Hamm Brewing Co., and Adolph Coors Co.

15. The distance to Boston, Massachusetts from St. Paul, Minnesota where Theo. Hamm Brewing Co. in 1964 had a brewery is 1,385 miles.

16. The distance to Boston, Massachusetts from Golden, Colorado where Adolph Coors Co. in 1964 had its only brewery is approximately 2,000 miles.

17. The distance to Boston, Massachusetts from Ft. Wayne, Indiana, where Falstaff in 1964 had a brewery is 844 miles.

18. In 1964, the defendant, in terms of dollar sales, was

the 375th largest of the Fortune Magazine listing of the 500 largest industrial corporations in the United States.

Philip F. Cody
Attorney, United States Department
of Justice

Attorneys for Falstaff Brewing
Corporation

SO ORDERED:

CHIEF UNITED STATES DISTRICT JUDGE

Providence Rhode Island

_____ 1969

1952 SALES OF BEERS [illegible]

(In terms of barrels of 31 gallons each)

| Rank | | 1952 | 1951 | % change 1952-51 |
|---|---|---|---|---|
| 1. | Anc. Schlitz Brewing Co. (2 plants) | 6,347,795 | 5,716,000 | 11.0 |
| 2. | Anheuser-Busch, Inc. (2 plants) | 6,034,443 | 5,[illegible],[illegible] | 10.1 |
| 3. | Pabst Brewing Co. (4 plants) | 4,640,000 | 4,450,000 | 3.4 |
| 4. | P. Ballantine & Sons | 4,038,000 | 3,990,000 | 1.2 |
| 5. | Miller Brewing Co. | 3,043,347 | 2,811,547 | 16.5 |
| 6. | Liebmann Breweries, Inc. (3 plants) | 2,900,000 | 2,800,000 | 3.6 |
| 7. | F. & M. Schaefer Brewing Co. (2 plants) | 2,400,000 | 2,600,000 | -7.7 |
| 8. | Falstaff Brewing Corp. (5 plants) | 2,276,663 | 2,594,842 | -12.2 |
| 9. | Jacob Ruppert (2 plants) | 1,800,000 | 1,317,370 | 18.6 |
| 10. | Blatz Brewing Co. | 1,669,252 | 1,758,905 | -7.6 |
| 11. | Pfeiffer Brewing Co. (2 plants) | 1,507,649 | 1,554,384 | -3.0 |
| 12. | Rocky Mtn. Brewing Co. (3 plants) | 1,473,177 | 1,343,477 | 9.6 |
| 13. | Goebel Brewing Co. (4 plants) | 1,449,436 | 1,407,795 | 2.7 |
| 14. | Griesedieck-Western Brewery Co. (2 plants) | 1,423,630 | 1,418,489 | 0.4 |
| 15. | Theo. Hamm Brewing Co. | 1,360,000 | 1,130,000 | 20.0 |
| 16. | Brewerys United U.S.A., Inc., (3 plants) | 1,222,[illegible] | 1,333,830 | -8.7 |
| 17. | C. Schmidt & Sons | 1,212,647 | 1,115,734 | 8.7 |
| 18. | Fiel Bros. (2 plants) | 1,200,000 | 1,090,000 | 10.1 |
| 19. | San Francisco Brewing Corp. | 961,379 | 837,750 | 14.8 |
| 20. | Brewing Corp. of America | 893,449 | 669,863 | 33.5 |
| 21. | Griesedieck Bros. Brewery Co. | 850,000 | 817,000 | 4.0 |
| 22. | Stroh Brewery Co. | 820,046 | 635,000 | 29.1 |
| 23. | Grocesse Brewing Co. | 799,931 | 730,000 | 9.5 |
| 24. | Maitland Brewing Co. | 775,000 | 705,000 | 9.9 |
| 25. | Hudepohl Brewing Co. | 767,000 | 697,000 | 10.0 |
| 26. | A. Gastner Brewing Co. | 750,000* | 800,000 | -6.2 |
| 27. | Adolph Coors Co. | 740,000 | 660,000 | 12.1 |
| 28. | Olympia Brewing Co. | 725,000 | 664,791 | 9.1 |
| 29. | Narragansett Brewing Co. (2 plants) | 690,000 | 600,000* | 15.0 |
| 30. | Pearl Brewing Co. | 677,788 | 606,806 | 11.7 |
| 31. | Geo. Wiedemann Brewing Co. | 661,000 | 590,000 | 12.5 |
| 32. | Duquesne Brewing Co. (2 plants) | 630,659 | 1,095,000 | -42.4 |
| 33. | G. Krueger Brewing Co. | 626,000 | 716,000 | -12.6 |
| 34. | Minneapolis Brewing Co. | 600,000 | | |
| 35. | Regal Amber Brewing Co. | 578,159 | 523,158 | 9.4 |
| 36. | M. K. Goetz Brewing Co. | 535,000* | 458,103* | 6.2 |
| 37. | Hudepohl Brewing Co. (2 plants) | 535,118 | 543,000* | -1.8 |
| 38. | Lone Star Brewing Co. | 500,566 | 448,538 | 11.6 |
| 39. | Fort Pitt Brewing Co. (2 plants) | 497,700 | 802,840 | -38.0 |
| 40. | Columbia Breweries, Inc. | 496,000* | | |
| 41. | Terre Haute Brewing Co. | 459,000 | 498,000 | -8.5 |
| 42. | Adam Schmidt Brewing Co. | 454,000 | 465,000 | 6.2 |
| 43. | Iroquois Beverage Corp. | 434,286 | 469,000 | 3.3 |
| 44. | Henry F. Grilleb Brewery Co. | 483,308 | 470,500 | 2.7 |
| 45. | Stegmaier Brewing Co. | 448,393 | 500,000 | -11.5 |
| 46. | Acme Breweries (2 plants) | 425,000 | 493,864 | -13.9 |
| 47. | Jacob Schmidt Brewing Co. | 383,621 | 409,375 | -6.3 |
| 48. | G. Heileman Brewing Co. | 377,843 | 372,993 | 1.3 |
| 49. | Huber Brewing Co. | 370,000 | 358,156 | 3.3 |
| 50. | West End Brewing Co. | 363,723 | 352,000 | 3.3 |
| 51. | Altes Brewing Co. (2 plants) | 350,798 | 406,381 | -13.7 |
| 52. | Erie Brewing Co. | 350,000 | 248,000 | 41.1 |
| 53. | Peter Hand Brewery Co. | 346,883 | 378,000* | -8.4 |
| 54. | Frankenheim Brewing Co. | 341,000 | 285,187 | 20.0 |
| 55. | Standard Brewing Co. (Cleveland) | 323,796 | 318,973 | 1.5 |
| 56. | Hyrup's Brewing Co. | 276,097 | 277,855 | -0.6 |
| 57. | Galveston-Houston Breweries | 266,000 | 306,315 | -13.2 |
| 58. | Stark Brewing Co. | 260,008 | 248,778 | 4.5 |
| 59. | Esslinger's, Inc. | 253,735 | 231,500 | 9.6 |
| 60. | I & B Brewing Co. | 242,882 | 163,997 | 48.1 |
| 61. | Peter Fox Brewing Co. | 226,123 | 234,000* | -3.4 |
| 62. | Hoffmeoffer & Co. | 207,997 | 218,555 | -4.8 |
| 63. | Wm. Gretz Brewing Co. | 203,845 | 220,000 | -8.9 |
| 64. | Berghoff Brewing Corp. | 198,630 | 226,607 | -12.4 |
| 65. | Arizona Brewing Co. | 182,531 | 177,406 | 2.9 |
| 66. | Chas. B. Hinz Co. | 181,849 | 183,500 | -0.9 |
| 67. | Hampden Brewing Co. | 180,821 | | |
| 68. | Lion Inc.-Gibbons Brewery | 179,779 | 172,500 | 3.6 |
| 69. | Canadian Ace Brewing Co. | 179,256 | 300,000* | -41.9 |
| 70. | Standard Brewing Co., Rochester, N.Y. | 172,644 | 172,000 | 0.4 |
| 71. | State Brewing Co., Inc. | 153,768* | 156,867 | -2.0 |
| 72. | Metropolis Brewery of New Jersey | 150,000 | | |
| 73. | Old Reading Brewery | 148,941 | 172,500 | -13.7 |
| 74. | Duncan's Brewery | 147,599 | 153,254 | -3.8 |
| 75. | A. Gretchen Brewing Co. | 138,767 | 145,333 | -4.6 |
| 76. | A. C. Ruegling & Son | 138,077 | 133,000 | 3.8 |
| 77. | Atlantic Brewing Co., Chicago | 136,516 | | |
| 78. | Fehrenbach & Schmidt Brewing Co. | 130,151 | 134,000 | -3.1 |
| 79. | Hamilton Brewing Co. (Bishop's) | 105,414 | | |
| 80. | Du Bois Brewing Co. | 105,000 | | |
| 81. | George F. Stein Brewery | 103,000 | 103,000 | 1.9 |
| 82. | Eagle Brewing Co. | 101,140 | 100,000 | 0.1 |
| 83. | Mt. Carbon Brewery | 100,000 | | |
| 84. | Great Falls Breweries | 89,000 | | |
| 85. | Beech Brewing Co. | 87,000* | | |
| 86. | Erie Brewing Co. | 80,000 | | |
| 87. | Lebanon Brewing Co. | 66,000 | | |

SOURCES: Modern Brewery Age and Brewers Journal*

(In terms of barrels of 31 gallons each)

| Rank | | 1951 | 1952 | % change 1951-52 |
|---|---|---|---|---|
| 1. | [illegible] Inc. (7 plants) | 8,711,777 | 6,891,153 | -21.0 |
| 2. | [illegible] Brewing Co. (2 plants) | 5,755,040 | 6,747,796 | +17.2 |
| 3. | [illegible] Co. (4 plants) | 4,750,000 | 4,809,000 | + 1.2 |
| 4. | P. Ballantine & Sons | 3,492,000 | 3,631,000 | + 3.9 |
| 5. | [illegible] Inc. (3 plants)/f | 3,100,000 | 3,900,000 | 0.0 |
| 6. | [illegible] Corp. (4 plants) | 2,513,343 | 2,376,443 | -27.0 |
| 7. | P & B [illegible] Co. (2 plants) | 2,400,000 | 2,178,000 | - 9.3 |
| 8. | [illegible] Co. | 2,503,120 | 2,013,347 | -21.0 |
| 9. | [illegible] (2 plants)/f | 2,000,975 | 1,800,000 | -11.1 |
| 10. | [illegible] Co. (3 plants) | 1,739,918 | 1,275,177 | -27.0 |
| 11. | [illegible] Co. | 1,245,715 | 1,300,831 | + 2.3 |
| 12. | [illegible] Co. (4 plants) | 1,579,494 | 1,115,138 | - 7.1 |
| 13. | [illegible] Brewing Co. (2 plants) | 1,143,631 | 1,127,630 | - 1.3 |
| 14. | [illegible] Co. (2 plants) | 1,---,000 | 1,597,000 | + 0.1 |
| 15. | [illegible] Co. (2 plants) | 1,130,730 | 1,272,163 | +12.5 |
| 16. | [illegible] (4 plants) | 1,375,000 | 1,220,000 | -11.3 |
| 17. | [illegible] | 1,277,939 | 1,217,457 | - 4.7 |
| 18. | [illegible] Co. | 1,118,844 | 979,000 | -12.5 |
| 19. | [illegible] Brewing Co. (formerly Brewing Corp. of America) | 1,099,025 | 997,119 | - 9.2 |
| 20. | San Francisco Brewing Corp. | 1,011,977 | 961,379 | - 5.0 |
| 21. | [illegible] Brewing Co. | 915,945 | 1,001,723 | +29.9 |
| 22. | [illegible] Brewing Co. | 950,000 | 969,000 | + 2.0 |
| 23. | [illegible] Brewing Co. | 923,330 | 630,457 | -31.7 |
| 24. | Cleveland Brew. Brewery Co. | 849,000 | 850,000 | + 0.1 |
| 25. | [illegible] Brewing Co. of Baltimore | 815,000 | 775,000 | - 5.1 |
| 26. | Gennesee Brewing Co. | 815,000 | 749,931 | - 1.1 |
| 27. | [illegible] Corp. | 813,000 | 720,000 | - 9.7 |
| 28. | [illegible] Brewing Co. | 800,000 | 750,0000 | - 6.7 |
| 29. | Geo. Wiedemann Brewing Co. | 785,000 | 661,000 | -15.8 |
| 30. | Pearl Brewing Co. | 779,121 | 677,748 | -13.0 |
| 31. | Olympia Brewing Co. | 744,000 | 725,000 | - 2.5 |
| 32. | Independent Brewing Co. | 722,978 | 699,000 | - 3.3 |
| 33. | Pittsburgh Brewing Co. | 618,000 | | |
| 34. | G. Bruce Brewing Co. | 625,367 | 599,000 | - 4.2 |
| 35. | Red Top Brewing Co. | 625,000 | 730,0000 | +16.8 |
| 36. | Minnesota Brewing Co. | 615,000 | 600,000 | - 2.4 |
| 37. | Regal Amber Brewing Co. | 601,100 | 572,516 | - 4.8 |
| 38. | Lone Star Brewing Co. | 574,973 | 500,546 | -12.9 |
| 39. | A. S. Love Brewing Co (2 plants) | 572,468 | 535,7220 | - 7.1 |
| 40. | G. Heileman Brewing Co. | 560,475 | 777,661 | +38.8 |
| 41. | Fort Pitt Brewing Co. (2 plants) | 500,001 | 497,988 | - 0.5 |
| 42. | Rheingold Brewing Co. | 454,000 | | |
| 43. | Adam Scheidt Brewing Co. | 477,546 | 465,000 | - 2.2 |
| 44. | Henry Kriesbach Brewery Co. | 474,566 | 403,308 | - 6.8 |
| 45. | Blatchford Brewing Co. (formerly Columbia Brew) | 473,000 | 468,0000 | - 1.0 |
| 46. | Jacob Schmidt Brewing Co. | 437,347 | 393,401 | -10.7 |
| 47. | Peter Hand Brewery Co. | 430,512 | 414,393 | - 3.7 |
| 48. | Drewrys Beverage Corp. | 428,119 | 464,736 | +21.0 |
| 49. | Stegmaier Brewing Co. | 421,772 | 412,393 | - 2.7 |
| 50. | Acme Breweries (3 plants) | 394,879 | 375,000 | - 4.2 |
| 51. | West End Brewing Co. | 344,748 | 363,773 | + 5.5 |
| 52. | Frankenmuth Brewing Co. | 334,921 | 311,000 | - 6.9 |
| 53. | Stroh Brewing Co. | 327,439 | 340,000 | + 3.9 |
| 54. | Allen Brewing Co. (2 plants) /ff | 333,445 | 350,719 | + 7.7 |
| 55. | Potter Brewing Co. | 321,419 | 370,000 | +15.1 |
| 56. | Erie Brewing Co. | 340,117 | 350,000 | + 2.9 |
| 57. | Southern Brew. | 278,543 | 253,735 | - 9.0 |
| 58. | Gulf Brewing Co. | 271,616 | 293,0000 | + 7.3 |
| 59. | Farmer Brewing Co. | 254,001 | 270,067 | + 7.4 |
| 60. | P & B Brewing Co. | 250,763 | 247,847 | - 1.0 |
| 61. | Pilsgreen Brew. Brewing Co. | 251,000 | 270,000 | + 7.0 |
| 62. | Carolina Ale Brewing Co. | 234,549 | 178,796 | -24.1 |
| 63. | Schweickhardten Breweries, Inc. | 227,736 | 204,000 | -10.5 |
| 64. | Peter Hand Brewing Co. | 207,555 | 221,173 | + 7.1 |
| 65. | Arizona Brewing Co. | 200,000 | 182,531 | - 8.8 |
| 66. | Geo. Hoelzbach Brewing Co. | 197,772 | | |
| 67. | Iron, Inc. - Queens Brewery | 176,141 | 179,779 | + 2.0 |
| 68. | William Penn Brewing Co. | 144,101 | 103,845 | - 9.5 |
| 69. | Hoffmeister & Co. | 102,726 | 207,997 | +81.1 |
| 70. | Genesee Brewing Co., Inc., Rochester | 175,126 | 172,414 | - 1.5 |
| 71. | Hampden Brewing Co. | 167,705 | 160,000 | - 4.6 |
| 72. | Atlantic Brewing Co. - Chicago | 103,147 | 138,536 | +34.3 |
| 73. | Charles E. Hires Co. | 140,417 | 181,959 | +29.7 |
| 74. | Metropolis Brewery of New Jersey, Inc. | 140,000 | 150,000 | + 6.7 |
| 75. | Dunkirk Brewery, Inc. | 154,907 | 147,520 | - 4.7 |
| 76. | Butler Brewing Co. | 154,000 | 141,000 | - 8.4 |
| 77. | Atlantic Seaport Brewing Co. | 152,000 | | |
| 78. | Duke Brewing Co. | 144,283 | 133,700 | -7.3 |
| 79. | Fox Head Brewing Co. | 137,000 | | |
| 80. | William Penn Brewery | 130,000 | | |
| 81. | Old Dominion Brewery, Inc. | 130,000 | 114,000 | -12.3 |
| 82. | Cannon Valley Brewing Co. | 116,377 | | |
| 83. | Rainier Brewing Co. | 115,000 | 107,111 | - 7.1 |
| 84. | Pearsall Brewing | 110,000 | 104,151 | - 5.3 |
| 85. | Kingsbury Breweries Co. | 107,107 | | |
| 86. | Dubois Brewing Co. | 100,000 | 101,000 | 1.0 |
| 87. | Pilsen Brewing Co. | 100,000 | | |
| 88. | A. G. Rheingold & Son | 107,991 | 122,077 | +13.0 |
| 89. | Louis G. Grunsfeld's Sons | 107,153 | 93,000 | -13.1 |
| 90. | Fred Koch Brewery, Inc. | 100,000 | | |
| 91. | Eagle Brewing Co. | 100,000 | 99,117 | - 1.0 |
| 92. | The Joos Brewing Co. | 99,000 | 111,000 | +12.1 |
| 93. | Duke Brewing Co. | 93,000 | 82,000 | -11.8 |
| 94. | Blatz Brewing Co. | 91,000 | 97,000 | + 7.7 |
| 95. | Rochester Brewing Co. | 90,000 | | |
| 96. | Gottlieb Brewing Co. | 82,000 | 122,307 | +49.6 |
| 97. | George F. Hess Brewing Co. | 80,000 | 100,000 | +25.0 |
| 98. | Hops Gardens Brewery, Inc. | 79,000 | 91,000 | +15.0 |

f Does not include Acme Breweries, acquired by Blatz on December, 1951

ff Includes Buffalo, N. Y. plant until sale in 1951

fff Includes San Diego, Calif., plant until operations discontinued on February 15, 1951

(In terms of barrels of 31 gallons each)

| Rank | | 1953 | 1952 | % change 1953 - 52 |
|---|---|---|---|---|
| 1. | Anheuser-Busch, Inc. (3 plants) | 5,829,360 | 6,711,722 | -13.1 |
| 2. | Jos. Schlitz Brewing Co. (3 plants) | 5,418,070 | 5,558,040 | - 2.5 |
| 3. | Pabst Brewing Co. (4 plants) | 4,[illegible] | 4,[illegible] | - 2.7 |
| 4. | P. Ballantine & Sons | 1,722,835 | 1,737,088 | - 1.1 |
| 5. | Falstaff Brewing Corp. (5 plants) | 3,[illegible] | 3,911,393 | - 1.0 |
| 6. | Theo. Hamm Brewing Co. (2 plants) | 2,[illegible] | 2,[illegible] | - 1.9 |
| 7. | J. & M. Schaefer Brewing Co. (2 plants) | 2,[illegible] | 2,[illegible] | - 1.9 |
| 8. | Miller Brewing Company | 2,[illegible] | 2,[illegible] | 0.6 |
| 9. | Liebmann Breweries Inc. (5 plants) | 1,[illegible] | 1,[illegible] | 10.0 |
| 10. | Leisy Lager Brewing Co. (3 plants) | 1,[illegible] | 1,[illegible] | 7.0 |
| 11. | Jacob Ruppert | 1,[illegible] | 1,[illegible] | -11.8 |
| 12. | G. Heileman & Sons (a) | 1,[illegible] | 1,[illegible] | 10.3 |
| 13. | Carling Brewing Co. (b) | 1,[illegible] | 1,[illegible] | 21.1 |
| 14. | Stroh Brewery Company | 1,[illegible] | 1,[illegible] | 20.6 |
| 15. | Pick Brew. (2 plants) | 1,[illegible] | 1,[illegible] | - 1.5 |
| 16. | Drewry's Limited U.S.A., Inc. (2 plants) | 1,[illegible] | 1,[illegible] | - 2.1 |
| 17. | Goebel Brewing Co. (4 plants) | 1,[illegible] | 1,[illegible] | -21.1 |
| 18. | Fidelity Brewing Co. (2 plants) (c) | 1,[illegible] | 1,[illegible] | -21.1 |
| 19. | San Francisco Brewing Corp. | 1,[illegible] | 1,[illegible] | 7.0 |
| 20. | Jackson Brewing Co. | 1,[illegible] | 935,000 | 7.7 |
| 21. | Blatz Brewing Co. | 977,[illegible] | 895,[illegible] | - 2.1 |
| 22. | Adolph Coors Co. | 939,000 | 817,000 | 15.1 |
| 23. | Duquesne Brewing Co. of Pittsburgh | 901,[illegible] | 922,[illegible] | - 2.0 |
| 24. | National Brewing Co. of Baltimore (d) | 907,000 | 850,000 | 7.1 |
| 25. | Pearl Brewing Co. | 826,[illegible] | 776,[illegible] | 6.5 |
| 26. | Olympia Brewing Co. | 815,000 | 764,000 | 6.7 |
| 27. | Geo. Wiedemann Brewing Co. | 811,000 | 760,000 | 6.7 |
| 28. | Brewers Brewing Co. Inc. | 810,000 | 815,000 | - 0.6 |
| 29. | Griesedieck Western Brewery Co. ( 2 plants) | 807,[illegible] | 1,[illegible] | -45.9 |
| 30. | Gunther Brewing Co. | 760,000 | 800,000 | - 5.0 |
| 31. | Narragansett Brewing Co. | 737,[illegible] | 738,000 | - 0.1 |
| 32. | Pittsburgh Brewing Co. | 686,000 | 720,000 | - 4.7 |
| 33. | Lone Star Brewing Co. | 644,[illegible] | 576,[illegible] | 11.8 |
| 34. | A. Hoyer Brewing Co. | 630,[illegible] | 665,[illegible] | - 5.1 |
| 35. | Grand Rapids Brewing Co. | 607,[illegible] | 601,[illegible] | 1.0 |
| 36. | Minneapolis Brewing Co. | 511,[illegible] | 615,[illegible] | -16.9 |
| 37. | F. & M. Schaefer Brewing Co. (2 plants) | 500,[illegible] | 573,[illegible] | -12.7 |
| 38. | G. Heileman Brewing Co. | 471,[illegible] | 700,[illegible] | -32.7 |
| 39. | Henry J. Gillich Brewery Co. | 444,[illegible] | 470,[illegible] | - 5.5 |
| 40. | Fort Pitt Brewing Co. (2 plants) | 415,[illegible] | 520,[illegible] | -20.2 |
| 41. | Stegmaier Brewing Co. | 403,[illegible] | 457,[illegible] | -11.8 |
| 42. | West End Brewing Co. | 388,[illegible] | 398,[illegible] | - 2.5 |
| 43. | Adam Scheidt Brewing Co. | 399,[illegible] | 477,[illegible] | -16.4 |
| 44. | Peter Hand Brewery Co. | 377,[illegible] | 430,[illegible] | -12.3 |
| 45. | Duquesne Beverage Corp. | 370,[illegible] | 430,[illegible] | -14.0 |
| 46. | Pennsylvania Brewing Co. | 355,[illegible] | 370,[illegible] | - 4.1 |
| 47. | Altes Brewing Co. | 350,[illegible] | 321,[illegible] | 9.0 |
| 48. | Gipp Brewing Co. | 343,[illegible] | 380,[illegible] | -10.0 |
| 49. | Esslinger's, Inc. | 337,[illegible] | 370,[illegible] | - 9.0 |
| 50. | Canadian Ace Brewing Co. | 753,[illegible] | 334,[illegible] | - 0.3 |
| 51. | Gulf Brewing Co. | 351,[illegible] | 371,[illegible] | - 5.4 |
| 52. | Potter Brewing Co. | 333,[illegible] | 371,[illegible] | -10.2 |
| 53. | Fitzgerald Bros. Brewing Co. | 326,[illegible] | 331,[illegible] | - 1.5 |
| 54. | A & B Brewing Co. | 320,[illegible] | 350,[illegible] | -11.7 |
| 55. | Arizona Brewing Co. | 310,[illegible] | 300,[illegible] | 3.3 |
| 56. | Hills-Brunswick Co. | 307,[illegible] | N.A. | |
| 57. | Harvard Brewing Co. | 297,[illegible] | 350,[illegible] | -15.1 |
| 58. | Lafayette Brewing Co. | 288,[illegible] | N.A. | |
| 59. | Hoffmann-Pilsner Brewing Co. | 283,[illegible] | 280,[illegible] | 0.6 |
| 60. | Edge, Inc. | 279,[illegible] | 300,[illegible] | - 6.9 |
| 61. | Peter Fox Brewing Co. | 275,[illegible] | 307,[illegible] | -10.4 |
| 62. | Wm. Gretz Brewing Co. | 269,[illegible] | 280,[illegible] | - 3.9 |
| 63. | Geo. Huntzinger Brewing Co. | 269,[illegible] | 299,[illegible] | - 9.9 |
| 64. | Standard Brewing Co. (Cleveland) | 268,[illegible] | 271,[illegible] | - 1.1 |
| 65. | Rheingold Brewing Co. | 261,[illegible] | 267,[illegible] | - 2.2 |
| 66. | Edwards Congress Brewing Co. | 255,[illegible] | 252,[illegible] | 1.2 |
| 67. | Chas. H. Ziller Co. | 251,[illegible] | 262,[illegible] | - 4.2 |
| 68. | Atlantic Brewing Co. (Chicago) | 244,[illegible] | 263,[illegible] | -16.7 |
| 69. | Diamond Brewery, Inc. | 236,[illegible] | 250,[illegible] | - 5.6 |
| 70. | Old Reading Brewery, Inc. | 235,[illegible] | 265,[illegible] | -11.3 |
| 71. | Metropolis Brewery of New Jersey, Inc. | 227,[illegible] | 250,[illegible] | - 9.2 |
| 72. | Kohler Brewing Co. | 220,[illegible] | 250,[illegible] | -12.0 |
| 73. | Knox Brewing Corp. | 216,[illegible] | 0,[illegible] | |
| 74. | Louis E. Dreschler's Sons | 214,[illegible] | 209,[illegible] | 2.4 |
| 75. | Hamburg Breweries Co. | 214,[illegible] | 227,[illegible] | - 5.7 |
| 76. | De Soto Brewing Co. | 212,[illegible] | 254,[illegible] | -16.5 |
| 77. | Manitowoc Brewing Co. | 215,[illegible] | 215,[illegible] | 0.0 |
| 78. | Great Falls Breweries, Inc. | 210,[illegible] | 97,[illegible] | 116.5 |
| 79. | A. Gottstein Brewing Co. | 206,[illegible] | 88,[illegible] | 134.1 |
| 80. | Independent Milwaukee Brewery | 203,[illegible] | 97,[illegible] | 109.3 |
| 81. | Fox Head Brewing Co. | 201,[illegible] | 170,[illegible] | 18.2 |
| 82. | C. C. Zarnoth & Son | 200,[illegible] | 200,[illegible] | - 0.1 |
| 83. | Bosch Brewing Co. | 97,[illegible] | 91,[illegible] | 6.6 |
| 84. | Fehrmann & Schenken | 95,[illegible] | 125,[illegible] | -24.0 |
| 85. | The Joseph Schlitz Co. | 85,[illegible] | 77,[illegible] | 10.4 |
| 86. | Tampa Florida Brewery, Inc. | 72,[illegible] | 72,[illegible] | 0.1 |
| 87. | Hudepohl Brewing Co. | 70,[illegible] | 73,[illegible] | - 4.1 |

N. A. - Not Available

(a) Does not include Acme Brewing Co., acquired by Heileman in mid-1953. See separate figure for Heileman.

(b) Includes plants at Belleville, Ill., and St. Louis, Mo., for last two months of year only. See separate figure for Griesedieck Western for first 10 months of year.

(c) Does not include Jacob Ruppert Brewing Co. acquired in November, 1953.

(d) Does not include Altes Brewing Co., controlling interest in which was acquired in Sept. 1953. See separate figure for Altes.

| | | | | |
|---|---|---|---|---|
| 1. | Jos. Schlitz Brewing Co. (3 plants) | 5,770,000 | 5,147,978 | 6.9 |
| 2. | Anheuser-Busch, Inc. (3 plants) | 5,411,473 | 5,771,760 | -7.7 |
| 3. | P. Ballantine & Sons | 3,973,000 | 3,719,935 | 6.8 |
| 4. | Falstaff Brewing Corp. (6 plants) | 3,417,773 | 3,389,978 | 11.8 |
| 5. | Pabst Brewing Co. (5 plants) | 3,570,000 | 3,200,000 | -10.3 |
| 6. | Liebmann Breweries, Inc. (5 plants) | 3,347,000 | 3,119,700 | -1.2 |
| 7. | Theo. Hamm Brewing Co. (2 plants) | 3,071,747 | 2,869,433 | 9.4 |
| 8. | F. & M. Schaefer Brewing Co. (2 plants) | 2,911,000 | 2,570,000 | 13.8 |
| 9. | Carling Brewing Co. (3 plants) | 2,665,439 | 2,479,177 | 21.9 |
| | Cincinnati-Western Brewery Co.(2 plants) | (4) | 602,976 | 114.9 |
| 10. | Miller Brewing Co. | 2,390,552 | 2,075,693 | 15.1 |
| 11. | Stroh Brewery Co. | 2,253,099 | 1,438,310 | 56.6 |
| 12. | G. Schmidt & Sons (2 plants) | 1,916,788 | 1,515,849 | 26.5 |
| | Adam Scholtz Brewing Co. | (5) | 399,344 | 0.1 |
| 13. | Lucky Lager Brewing Co. (3 plants) | 1,671,010 | 1,775,456 | -5.8 |
| 14. | Jacob Ruppert | 1,437,677* | 1,748,845 | -17.8 |
| 15. | Drewrys Limited U.S.A., Inc.(3 plants) | 1,425,145 | 1,373,713 | 3.8 |
| 16. | Pfeil Bros. (2 plants) | 1,380,000 | 1,395,000 | -1.1 |
| 17. | National Brewing Co. (2 plants) | 1,186,388 | 933,000 | 15.0 |
| | Altes Brewing Co. | (4) | 380,388 | 114.9 |
| 18. | Pfeiffer Brewing Co. (2 plants) | 1,108,300 | 1,045,788 | 13.1 |
| | Jacob Schmidt Brewing Co. | (4) | N.A. | |
| 19. | Goebel Brewing Co. (2 plants) | 1,116,110 | 1,154,195 | -4.1 |
| 20. | San Francisco Brewing Corp. | 1,059,482 | 1,016,116 | 4.3 |
| 21. | Acme Brewing Co. | 1,013,873 | 999,000 | 1.5 |
| 22. | Jackson Brewing Co. | 1,000,000 | 1,000,000 | 0.0 |
| 23. | Duquesne Brewing Co. | 987,617 | 958,157 | 3.1 |
| 24. | Lion Brewing Co. | 978,000 | 977,000 | 0.1 |
| 25. | Olympia Brewing Co. | 845,000 | 845,000 | 0.0 |
| 26. | Pearl Brewing Co. | 843,535 | 839,815 | 0.4 |
| 27. | Geo. Wiedemann Brewing Co. | 819,000 | 821,000 | -0.2 |
| 28. | Independent Brewing Co. | 816,725 | 779,000 | 4.8 |
| 29. | Genesee Brewing Co. | 800,000 | 810,000 | -1.2 |
| 30. | Hamilton Brewing Co. | 800,000 | 760,000 | 5.2 |
| 31. | Pittsburgh Brewing Co. | 756,000 | 685,000 | 10.4 |
| 32. | Lone Star Brewing Co. | 775,776 | 685,000 | 13.2 |
| 33. | International Breweries Inc.(2 plants) | 675,305 | 750,165 | (6) -9.9 |
| 34. | G. Krueger Brewing Co. | 630,777 | 630,812 | -0.0 |
| 35. | Rheingold Brewing Co. | 630,000 | N.A. | |
| 36. | Regal Pale Brewing Co. | 619,812 | 687,887 | -9.9 |
| 37. | G. Heileman Brewing Co. | 597,631 | 573,537 | 4.2 |
| 38. | Henry F. Ortlieb Brewing Co. | 570,938 | 554,938 | 2.9 |
| 39. | Minneapolis Brewing Co. | 570,977 | 721,738 | -20.9 |
| 40. | Wiedemann Brewing Co. | 563,000 | 580,000 | -2.9 |
| 41. | H. K. & F. Gipps Brewing Co. (2 plants) | 531,340 | 500,993 | 6.1 |
| 42. | Heidelberg Brewing Co. | 502,000 | N.A. | |
| 43. | Peter Hand Brewing Co. | 500,000 | 773,333 | -35.3 |
| 44. | Stegmaier Brewing Co. | 478,000 | 478,000 | 0.0 |
| 45. | Fort Pitt Brewing Co. (2 plants) | 375,000 | 335,000 | 11.9 |
| 46. | Ballinger's, Inc. | 367,772 | 337,000 | 9.1 |
| 47. | Canadian Ace Brewing Co. | 364,573 | 333,000 | 9.4 |
| 48. | Erie Brewing Co. | 317,961 | 883,934 | -64.0 |
| 49. | Kaier Brewing Co. | 316,714 | 332,498 | -4.8 |
| 50. | Arizona Brewing Co. | 303,914 | 288,102 | 5.5 |
| 51. | Latrobe Brewing Co. | 302,998 | 285,000 | 6.3 |
| 52. | G-K-F Brewing Co. | 291,000 | 280,000 | 3.9 |
| 53. | Little-Weidmann Co. | 284,000 | 280,000 | 1.4 |
| 54. | E. & B. Brewing Co. | 283,778 | 280,000 | 1.3 |
| 55. | Broward Brewing Co. | 283,335 | 297,000 | -4.6 |
| 56. | Lion, Inc. - Gibbons Brewery | 282,000 | 279,000 | 1.1 |
| 57. | Peter Fox Brewing Co. | 278,000 | 276,772 | 0.4 |
| 58. | Hampden Brewing Co. | 276,776 | 261,000 | 6.0 |
| 59. | American Brewing Co., New Orleans | 275,000 | N.A. | |
| 60. | Standard Brewing Co. (N.Y.) | 273,677 | 262,000 | 4.5 |
| 61. | Kingsbury Breweries Co. | 272,772 | 270,000 | 1.0 |
| 62. | Gen. Beer Distributors Brewing Co. | 268,777 | 250,000 | 7.5 |
| 63. | Duquesne Brewing Corp. | 266,000 | 250,000 | 6.4 |
| 64. | Duffy-Mott & Co. | 265,000 | 260,000 | 1.9 |
| 65. | Metropolis Brewery of N.J., Inc. | 262,000 | 260,000 | 0.8 |
| 66. | Old Bowling Brewery, Inc. | 258,000 | 255,000 | 1.2 |
| 67. | Wm. Gretz Brewing Co. | 253,000 | 250,000 | 1.2 |
| 68. | Chas. H. Baier Co. | 245,000 | 250,000 | -2.0 |
| 69. | American Brewing Co., Flint | 240,000 | N.A. | |
| 70. | Galveston-Houston Breweries | 238,000 | N.A. | |
| 71. | Stein Brewing Co. | 235,000 | N.A. | |
| 72. | Bosworth Brewing Co., Inc. | 230,000 | 230,000 | 0.0 |
| 73. | Bohemian Brewing Co. | 230,000 | 230,000 | 0.0 |
| 74. | Canadian Brewing Co. | 223,577 | 220,000 | 1.6 |
| 75. | Great Falls Breweries, Inc. | 220,000 | 220,000 | 0.0 |
| 76. | Independent Milwaukee Brewery | 218,000 | 220,000 | -0.9 |
| 77. | De Soto Brewing Co. | 215,000 | 220,000 | -2.3 |
| 78. | Hollander Brewing Co. | 214,000 | N.A. | |
| 79. | A. Gottstein Brewing Co. | 211,000 | 210,000 | 0.5 |
| 80. | E. G. Brandenburg & Son | 205,000 | 200,000 | 2.5 |
| 81. | Staub Brewing Co. | 200,000 | 77,000 | 159.7 |
| 82. | Eagle Brewing Co. | 80,000 | N.A. | |
| 83. | Tampa Florida Brewery, Inc. | 80,000 | 77,000 | 3.9 |
| 84. | Hancock Brewing Co. | 75,000 | 75,000 | 0.0 |

N. A. - Not Available

Taken over by Carling's Brewery, 1958.
Taken over by G. Schmidt & Sons in mid-1958.
Taken over by National Brewing Co. in September, 1958.
Taken over by Pfeiffer Brewing Co. in December, 1958.
Total sales of Iroquois Brewing Corp. (388,388 barrels) and Fredonmenth Brewing Co. (288,388 barrels) in 1958.
1958-59 comparison if consolidation had taken place one year earlier.

Source: [illegible]

1958 SALES OF BEVERAGE ALCOHOLS

(In terms of barrels of 31 gallons)

| Rank | | 1958 | 1957 | % Change 1957-58 |
|---|---|---|---|---|
| 1. | Jos. Schlitz Brewing Co. (3 plants) | 5,940,835 | 5,940,000 | |
| 2. | Anheuser-Busch, Inc. (3 plants) | 5,474,503 | 5,411,473 | |
| 3. | P. Lorillard & Co. | 3,444,534 | 3,441,470 | |
| 4. | Falstaff Brewing Corp. (3 plants) | 3,273,000 | 3,257,921 | |
| 5. | Pabst Brewing Co. (4 plants) | 3,230,000 | 3,300,000 | |
| 6. | Theo. Hamm Brewing Co. (2 plants) | 3,121,418 | 3,071,847 | |
| 7. | Liebmann Breweries (5 plants) | 2,950,000 | 2,967,000 | |
| 8. | Carling Brewing Co. (4 plants) | 2,541,839 | 2,572,619 | |
| 9. | F. & M. Schaefer Brewing Co. (2 plants) | 2,430,000 | 2,421,000 | |
| 10. | The Stroh Brewery Co. | 2,760,758 | 2,191,077 | |
| 11. | Miller Brewing Co. | 2,215,419 | 2,190,658 | |
| 12. | Lucky Lager Brewing Co. (2 plants) | 1,940,114 | 1,823,548 | |
| 13. | C. Schmidt & Sons, Inc. (2 plants) | 1,850,134 | 1,918,738 | |
| 14. | Jacob Ruppert | 1,831,868 | 1,831,877 | |
| 15. | Brewers Limited Co., Inc. (3 plants) | 1,536,393 | 1,435,168 | |
| 16. | Pfeil Bros. (2 Plants) | 1,487,888 | 1,540,000 | |
| 17. | National Brewing Co. (Baltimore) (3 plants) | 1,370,000 | 1,364,188 | |
| 18. | Adolph Coors Co. | 1,290,376 | 1,262,873 | |
| 19. | Jackson Brewing Co. | 1,251,888 | 1,278,888 | |
| 20. | Duquesne Brewing Co. | 1,065,773 | 1,[illegible] | |
| 21. | Rheingold Brewing Corp. | 1,053,[illegible] | 1,[illegible] | |
| 22. | Pfeiffer Brewing Co. (3 plants) | 1,030,851 | 1,[illegible] | |
| 23. | Olympia Brewing Co. | 1,014,888 | 1,[illegible] | |
| 24. | Blatz Brewing Co. | 960,888 | [illegible] | |
| 25. | Pearl Brewing Co. | 894,737 | [illegible] | |
| 26. | Narragansett Brewing Co. | 888,9[illegible] | [illegible] | |
| 27. | Geo. Wiedemann Brewing Co. | 835,888 | [illegible] | |
| 28. | Goebel Brewing Co. (3 plants) | 826,888 | [illegible] | |
| 29. | International Breweries Inc. (3 plants) | 818,888 | [illegible] | |
| 30. | Genesee Brewing Co. | 888,888 | [illegible] | |
| 31. | Gunther Brewing Co. | 888,888 | [illegible] | |
| 32. | Pittsburgh Brewing Co. | 784,[illegible] | [illegible] | |
| 33. | Lone Star Brewing Co. | 753,[illegible] | [illegible] | |
| 34. | G. Krueger Brewing Co. | [illegible] | [illegible] | |
| 35. | Regal Pale Brewing Co. | 772,888 | [illegible] | |
| 36. | Sterling Brewers, Inc. | 738,888 | [illegible] | |
| 37. | Minneapolis Brewing Co. | 737,888 | [illegible] | |
| 38. | G. Heileman Brewing Co. | 681,[illegible] | [illegible] | |
| 39. | Drewrys Ltd. U.S.A. Inc. | 651,888 | [illegible] | |
| 40. | D. G. Yuengling & Son, Inc. | 639,888 | [illegible] | |
| 41. | Henry F. Ortlieb Brewery Co. | 634,888 | [illegible] | |
| 42. | Heidelberg Brewing Co. | 628,888 | [illegible] | |
| 43. | Stegmaier Brewing Co. | 625,[illegible] | [illegible] | |
| 44. | Erie Brewing Co. | 614,[illegible] | [illegible] | |
| 45. | Ballantine's Inc. | 602,[illegible] | [illegible] | |
| 46. | Latrobe Brewing Co. | 593,888 | [illegible] | |
| 47. | Park Plaz Enterprises | 574,[illegible] | [illegible] | |
| 48. | Arizona Brewing Co. | 511,[illegible] | [illegible] | |
| 49. | Pfaz Beer Brewing Co. | 508,111 | [illegible] | |
| 50. | Stegmaier Breweries Co. | 506,[illegible] | [illegible] | |
| 51. | Hillsboro Beer Co. | 505,[illegible] | [illegible] | |
| 52. | The Lion, Incorporated Brewery | 503,[illegible] | [illegible] | |
| 53. | Rheingold Brewing Corp. | 502,[illegible] | [illegible] | |
| 54. | Harrison Brewing Co. (Miami) | 488,[illegible] | [illegible] | |
| 55. | Hampden Brewing Co. | 486,[illegible] | [illegible] | |
| 56. | Standard Brewing Co., Inc. (Rochester) | 477,[illegible] | [illegible] | |
| 57. | Harvard Brewing Co. | 460,[illegible] | [illegible] | |
| 58. | Metropolis Brewery of New Jersey, Inc. | 441,888 | [illegible] | |
| 59. | S & S Brewing Co. | 438,[illegible] | [illegible] | |
| 60. | Rolfsmeier & Co. | 418,[illegible] | [illegible] | |
| 61. | Wm. Gretz Brewing Co. | 416,[illegible] | [illegible] | |
| 62. | Rainier Brewing Co. | 414,[illegible] | [illegible] | |
| 63. | Old Dutch Brewery | 397,[illegible] | [illegible] | |
| 64. | Geo. E. Ehret Co. | 395,[illegible] | [illegible] | |
| 65. | Texas Pale Breweries, Inc. | 394,[illegible] | [illegible] | |
| 66. | Bosman's Brewery Inc. | 393,[illegible] | [illegible] | |
| 67. | Hampton Brewing Co. | 393,[illegible] | [illegible] | |
| 68. | Independent Milwaukee Brewery | 388,[illegible] | [illegible] | |
| 69. | Wilks Brewing Co. | 388,[illegible] | [illegible] | |
| 70. | William Simon Brewery | 386,888 | [illegible] | |
| 71. | A. Gottschalk Brewing Co. | 383,[illegible] | [illegible] | |
| 72. | Duluth Brewing Co. | 377,[illegible] | [illegible] | |
| 73. | Schaefer-Hoffman Brewing Co. | 365,[illegible] | [illegible] | |
| 74. | D. G. Yuengling & Son, Inc. | 97,[illegible] | [illegible] | |
| 75. | Hanau Brewing Co. | 93,[illegible] | [illegible] | |
| 76. | Huebner Brewing Co. | 93,[illegible] | [illegible] | |
| 77. | Edmonton Brewing Co. (Ashland) | 89,[illegible] | [illegible] | |
| 78. | Troy Beer Brewery | 88,[illegible] | [illegible] | |
| 79. | Eagle Brewing Co. | 88,[illegible] | [illegible] | |
| 80. | Tampa Florida Brewery Inc. | 87,888 | [illegible] | |

N.A. - Not Available
N. - Ceased operations, December 1958

Sources: [illegible]

(In terms of barrels of 31 gallons)

| [illegible] | [illegible] | [illegible] | [illegible] |
|---|---|---|---|
| 1. [illegible] (3 plants) | 6,214,000e | 5,945,973 | |
| 2. [illegible] (4 plants) | 4,731,[illegible] | 5,[illegible] | |
| 3. [illegible] (3 plants) | 4,[illegible] | 4,[illegible] | |
| 4. [illegible] | 3,[illegible] | 3,[illegible] | |
| 5. [illegible] | 3,[illegible] | 3,[illegible] | |
| 6. [illegible] | 2,[illegible] | 2,[illegible] | |
| 7. [illegible] | 2,[illegible] | 2,[illegible] | |
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| 198. [illegible] | 1,[illegible] | 1,[illegible] | |
| 199. [illegible] | 1,[illegible] | 1,[illegible] | |
| 200. [illegible] | 1,[illegible] | 1,[illegible] | |

1. Includes Ann Arbor Brewing Co. figure.

2. Hampden & Portland Breweries were merged in 1939. 1938 Index figure is combined figures.

3. Production taken over by Gambrinus.

N.A. - Not available

SOURCE: [illegible]
e ESTIMATED
r REVISED FIGURE
In the case of conflicts between the sources the highest figure has been used.

1938 SALES OF BEVERAGE CONTAINERS[1]

(In terms of barrels of 31 gallons)

| RANK | | 1938 | 1937 | % Change 1937-38 |
|---|---|---|---|---|
| 1. | Schmidt Brewing, Inc. (4 plants) | 4,567,000 | 4,116,000 | 10.9 |
| 2. | Jos. Schlitz Brewing Co. (4 plants) | 3,893,000 | 3,873,000 | .5 |
| 3. | Falstaff Brewing Company (3 plants) | 3,500,000 | 3,500,000 | 0.0 |
| 4. | Pabst Brewing Co.,and (3 plants)[2] | 3,370,000 | 3,146,000 | 7.1 |
| 5. | P. Ballantine & Sons | 3,235,000 | 3,301,000 | -2.0 |
| 6. | Carling Brewing Company (5 plants)[3] | 3,131,000 | 3,150,000 | -.6 |
| 7. | Theo. Hamm Brewing Company (1 plant) | 2,390,000 | 2,179,000 | 9.7 |
| 8. | The P. & R. Schaefer Brewing Co. (2 plants) | 2,370,000 | 2,150,000 | 10.2 |
| 9. | Lieb mann Breweries, Inc. (1 plant) | 2,253,000 | 2,256,000 | -.1 |
| 10. | Miller Brewing Company | 2,127,000 | 2,120,000 | .3 |
| 11. | Lucky Lager Brewing Co. (2 plants) | 2,065,000 | 2,060,000 | .2 |
| 12. | The Stroh Brewery Co. | 1,915,000 | 1,581,000 | 21.1 |
| 13. | C. Schlitz & Sons, Inc. (2 plants) | 1,660,000 | 1,707,000 | -2.8 |
| 14. | Brewers United G.B.A., Inc. (1 plant) | 1,577,000 | 1,368,000 | 15.3 |
| 15. | Jacob Ruppert | 1,530,000 | 1,540,000 | -.6 |
| 16. | Pick Bros., Inc. (2 plants) | 1,420,000 | 1,435,000 | -1.0 |
| 17. | Adolph Coors Company | 1,400,000 | 1,320,000 | 6.1 |
| 18. | Lebanon Brewing Company (1 plant) | 1,370,000 | 1,380,000 | -.7 |
| 19. | Olympia Brewing Company | 1,240,000 | 1,180,000 | 5.1 |
| 20. | Duquesne Brewing Co. of Pittsburgh, Penna. | 1,230,000 | 1,260,000 | -2.4 |
| 21. | Jackson Brewing Company | 1,230,000 | 1,250,000 | -1.6 |
| 22. | Pearl Brewing Company | 1,200,000 | 1,210,000 | -.8 |
| 23. | Rheingold Brewing Company | 1,200,000 | 1,200,000 | 0.0 |
| 24. | Narragansett Brewing Co. (2 plants) | 1,180,000 | 1,180,000 | 0.0 |
| 25. | Pfeiffer Brg Company (2 plants) | 1,150,000 | 1,150,000 | 0.0 |
| 26. | International Breweries, Inc. (4 plants) | 1,100,000 | 1,100,000 | 0.0 |
| 27. | Gunther Brewing Company | 1,080,000 | 1,080,000 | 0.0 |
| 28. | Lone Star Brewing Company | 1,060,000 | 1,060,000 | 0.0 |
| 29. | Pittsburgh Brewing Company | 1,040,000 | 1,040,000 | 0.0 |
| 30. | Genesee Brewing Company | 1,020,000 | 1,020,000 | 0.0 |
| 31. | Leisy Brewing Company | 1,000,000 | 1,000,000 | 0.0 |
| 32. | Grain Belt Brewing Co. (2 plants) | 980,000 | 980,000 | 0.0 |
| 33. | Minneapolis Brewing Co. (2 plants) | 960,000 | 960,000 | 0.0 |
| 34. | G. Krueger Brewing Company | 950,000 | 950,000 | 0.0 |
| 35. | Regal Pale Brewing Company | 940,000 | 940,000 | 0.0 |
| 36. | Yuk Hai Brewing Company | 920,000 | 920,000 | 0.0 |
| 37. | D. G. Yuengling & Son | 900,000 | 900,000 | 0.0 |
| 38. | C. Haffenreffer Brewing Company | 880,000 | 880,000 | 0.0 |
| 39. | Stegmaier Brewing Company | 860,000 | 860,000 | 0.0 |
| 40. | Hull Brewing Company | 840,000 | 840,000 | 0.0 |
| 41. | Stegmaier Brewing Company | 820,000 | 820,000 | 0.0 |
| 42. | Erie Brewing Company | 800,000 | 800,000 | 0.0 |
| 43. | Southern Select Breweries | 780,000 | 780,000 | 0.0 |
| 44. | Kingsbury Breweries Company | 760,000 | 760,000 | 0.0 |
| 45. | Louis F. Dormitzer's Sons | 740,000 | 740,000 | 0.0 |
| 46. | The Blatz Brewing Company | 720,000 | 720,000 | 0.0 |
| 47. | Hudepohl Brewing Company | 700,000 | 700,000 | 0.0 |
| 48. | Artesian Brewing Company | 680,000 | 680,000 | 0.0 |
| 49. | Independence Milwaukee Brewing | 660,000 | 660,000 | 0.0 |
| 50. | Metropolis Brewery of D.C., Inc. | 640,000 | 640,000 | 0.0 |
| 51. | Fox Head Brewing Company | 620,000 | 620,000 | 0.0 |
| 52. | The Old Reading Brewery, Inc. | 600,000 | 600,000 | 0.0 |
| 53. | Great Falls Breweries, Inc. | 580,000 | 580,000 | 0.0 |
| 54. | Weber Brewing Company | 560,000 | 560,000 | 0.0 |
| 55. | A. Gettelman Brewing Company | 540,000 | 540,000 | 0.0 |
| 56. | Cleveland-Sandusky Brewing Co. | 520,000 | 520,000 | 0.0 |
| 57. | Acme Brewing Company | 500,000 | 500,000 | 0.0 |
| 58. | Hamilton Brewing Co. | 480,000 | 480,000 | 0.0 |
| 59. | Walter Brewing Company (Colorado) | 460,000 | 460,000 | 0.0 |
| 60. | The Goetz Brewing Company | 440,000 | 440,000 | 0.0 |
| 61. | Stag Brewing Company | 420,000 | 420,000 | 0.0 |
| 62. | Diamond Brewery Company | 400,000 | 400,000 | 0.0 |
| 63. | Grand Rapids Brewing Company | 380,000 | 380,000 | 0.0 |
| 64. | Home Brewing Company | 360,000 | 360,000 | 0.0 |
| 65. | Jacob Leinenkugel Brewing Co. | 340,000 | 340,000 | 0.0 |
| 66. | Tivoli Brewing Company | 320,000 | 320,000 | 0.0 |
| 67. | Acadia Brewing Company | 300,000 | 300,000 | 0.0 |
| 68. | Oshkosh Brewing Company | 280,000 | 280,000 | 0.0 |
| 69. | Blue Ribbon Beg Brewing Corp. | 260,000 | 260,000 | 0.0 |
| 70. | Fox, Deluxe Brewing Company | 240,000 | 240,000 | 0.0 |
| 71. | Geo. Walter Brewing Company | 220,000 | 220,000 | 0.0 |
| 72. | Stevens Point Beverage Company | 200,000 | 200,000 | 0.0 |
| 73. | John Hauenstein Company | 180,000 | 180,000 | 0.0 |
| 74. | The Regent Brewing Company | 160,000 | 160,000 | 0.0 |
| 75. | Hamilton Breweries (Idaho) | 140,000 | 140,000 | 0.0 |
| 76. | Bohemian Club Brewing Company | 120,000 | 120,000 | 0.0 |
| 77. | Tivoli Brewing Company (Minnesota) | 100,000 | 100,000 | 0.0 |
| 78. | Bohle Brewing Company | 80,000 | 80,000 | 0.0 |
| 79. | Spoetzl Brewery | 60,000 | 60,000 | 0.0 |
| 80. | Blue Lake Brewing Company | 40,000 | 40,000 | 0.0 |
| 81. | Hilltoper Brewing Company | 20,000 | 20,000 | 0.0 |
| 82. | Berlin Brewing Company | 7,000 | 7,000 | 0.0 |

1 Sales and Rank revised to 1938. 1937 and 1938 sales figures are combined totals.
2 Acquired Pittsburgh Brewing Company.
3 Merged with Wiley Underwood Brewing Co. in 1938.

SYMBOLS: (In the case of conflict between the symbols, the highest figure has been used.)

1923 SALES OF BREWING CONCERNS

(In terms of barrels of 31 gallons)

| RANK | | 1922 | 1921 | % Change 1922-21 |
|---|---|---|---|---|
| 1. | Anheuser-Busch, Inc. (3 plants) | 8,054,756 | 4,000,000 | 13.5 |
| 2. | Jos. Schlitz Brewing Co. (2 plants) | 3,963,000 | 3,811,000 | 4.0 |
| 3. | Pabst Brewing Corp. (2 plants) | 3,740,000 | 4,000,000 | -6.5 |
| 4. | Carling Brewing Company (2 plants)[1] | 4,500,000 | 4,500,000 | 0.0 |
| 5. | P. Ballantine & Sons (6 plants) | 3,614,444 | 3,511,122 | 2.9 |
| 6. | Theo. Hamm Brewing Co. (1 plant) | 3,350,163 | 3,031,193 | 7.5 |
| 7. | The F. & M. Schaefer Brewing Co. (2 plants) | 3,551,859 | 3,324,706 | 6.8 |
| 8. | Lieb-man Breweries, Inc. (1 plant) | 3,000,000 | 2,970,000 | 1.0 |
| 9. | Miller Brewing Company | 2,500,000 | 2,000,000 | 25.0 |
| 10. | Ruppert Brewing Co. (1 plant) | 2,350,000 | 2,312,773 | 1.6 |
| 11. | The Blatz Brewing Company | 2,150,000 | 2,000,000 | 7.5 |
| 12. | C. Schmidt & Sons, Inc. (2 plants)[2] | 2,110,000 | 1,950,000 | 8.2 |
| 13. | Brewers Ltd., U. S. A., Inc. (4 plants)[3] | 1,700,000 | 1,600,000 | 6.3 |
| 14. | Stroh Brewery Company | 1,600,000 | 1,577,000 | 1.5 |
| 15. | Fiel Bros., Inc. (2 plants) | 1,600,000 | 1,400,000 | 14.3 |
| 16. | Joseph Ruppert | 1,511,000 | 1,470,000 | 2.8 |
| 17. | Gipsie Brewing Company | 1,450,000 | 1,450,000 | 0.0 |
| 18. | National Brewing Company (1 plant) | 1,415,000 | 1,200,000 | 17.9 |
| 19. | Duquesne Brewing Co. of Pittsburgh | 1,340,000 | 1,300,000 | 3.1 |
| 20. | Rheingreistoer Brewing Corporation | 1,300,000 | 1,032,266 | 25.9 |
| 21. | Pearl Brewing Company | 970,000 | 972,000 | -0.2 |
| 22. | Acthorn Brewing Company | 967,581 | 981,139 | -1.4 |
| 23. | International Breweries, Inc. (6 plants) | 961,000 | 1,020,351 | -5.7 |
| 24. | Narragansett Brewing Company | 932,000 | 835,000 | 11.6 |
| 25. | Pfeiffer Brewing Company (3 plants)[4] | 904,715 | 840,821 | 7.6 |
| 26. | Lone Star Brewing Company | 897,866 | 824,453 | 8.9 |
| 27. | Pittsburgh Brewing Company | 805,794 | 785,148 | 2.6 |
| 28. | Gunther Brewing Company | 804,868 | 734,473 | 9.6 |
| 29. | Ortlieb Brewing Company | 800,000 | 800,000 | 0.0 |
| 30. | Rubsam & Horrmann Brewing Company | 800,000 | 780,000 | 2.6 |
| 31. | G. Heileman Brewing Co. (2 plants)[5] | 650,000 | 647,000 | 0.5 |
| 32. | Minneapolis Brewing Co. (2 plants) | 643,351 | 647,000 | -0.6 |
| 33. | Central Brewing Company (2 plants) | 640,000 | 650,838 | -1.7 |
| 34. | G. Krueger Brewing Company | 340,000 | 626,349 | -45.7 |
| 35. | West End Brewing Company | 525,000 | 787,000 | -33.3 |
| 36. | H. K. Curtis Brewing Company | 461,000 | 450,000 | 2.4 |
| 37. | Maier Brewing Company | 447,000 | 410,000 | 9.0 |
| 38. | Canadian Ace Brewing Company | 426,211 | 389,000 | 9.6 |
| 39. | Regal Pale Brewing Company | 350,000 | 341,000 | 2.6 |
| 40. | Erie Brewing Company | 351,843 | 321,000 | 9.6 |
| 41. | Minneapolis-Harvard Breweries | 324,737 | 321,000 | 1.2 |
| 42. | Eberhardt Brewing Company | 290,000 | 270,000 | 7.4 |
| 43. | The Lion, Inc.-Hibbard Brewery | 211,936 | 201,618 | 5.1 |
| 44. | Fox Head Brewing Company | 211,000 | 200,730 | 5.1 |
| 45. | Louis F. Haentzler's Sons | 211,000 | 335,000 | -36.9 |
| 46. | E. & B. Brewing Company | 197,057 | 205,251 | -4.0 |
| 47. | The Old Reading Brewery, Inc. | 171,140 | 110,300 | 55.1 |
| 48. | Arizona Brewing Company, Inc. | 171,000 | 185,000 | -7.6 |
| 49. | Metropolis Brewery of N. J., Inc. (2 plants) | 167,580 | 156,000 | 7.4 |
| 50. | Independent Milwaukee Brewery | 165,000 | 159,000 | 3.8 |
| 51. | Great Falls Breweries, Inc. | 141,000 | 170,787 | -17.4 |
| 52. | Schultze Brewing Company | 136,710 | 140,634 | -2.8 |
| 53. | A. Gottlieb Brewing Company | 134,000 | 132,934 | 0.8 |
| 54. | Wm Merrill Brewing Company | 131,138 | 139,389 | -5.9 |
| 55. | Wm. Gretz Brewing Company | 123,052 | 102,191 | 20.4 |
| 56. | Reisch Brewing Company | 101,764 | 90,253 | 12.8 |
| 57. | Walter Brewing Company (Colorado) | 101,196 | 100,877 | 0.3 |
| 58. | Eagle Brewing Company | 98,700 | 92,000 | 7.3 |
| 59. | Bisse Brewing Company | 97,000 | 100,000 | -3.0 |
| 60. | Fred Koch Brewery | 88,139 | 104,943 | -16.0 |
| 61. | Joure Brewing Company | 87,550 | 89,000 | -1.6 |
| 62. | Bismarck Spring Brewery | 86,500 | 82,000 | 5.5 |
| 63. | Grace Bros. Brewing Company | 80,000 | 85,000 | -5.9 |
| 64. | Jacob Leinenkugel Brewing Company | 77,000 | 61,000 | 26.2 |
| 65. | Fehrenbach & Schmidt Brewing Company | 71,000 | 77,328 | -8.2 |
| 66. | Grants Brewing Company | 66,140 | 70,342 | -5.9 |
| 67. | Oshkosh Brewing Company | 62,812 | 59,118 | 6.2 |
| 68. | Edmiston Breweries, Inc. (Idaho) | 59,881 | 57,885 | 3.4 |
| 69. | Fox-Green Bay Brewing Corp. | 59,000 | 80,181 | -26.4 |
| 70. | Jos. Schorr Brewing Company | 48,414 | 40,814 | 18.6 |
| 71. | Jos. Walter Brewing Company | 40,800 | 38,889 | 4.9 |
| 72. | Phoenix Point Brewing Company | 39,185 | 37,738 | 3.8 |
| 73. | The Peoples Brewing Company | 38,000 | 37,000 | 2.7 |
| 74. | Pengrace Brewing Company, Inc. | 33,687 | 33,645 | 0.1 |
| 75. | August Schell Brewing Company | 30,688 | 30,720 | -0.1 |
| 76. | Hahn Brewing Company | 29,352 | N.L. | |
| 77. | Schmiedler Brewing Company | 23,822 | 23,386 | 1.9 |
| 78. | Spatzl Brewery | 22,358 | 24,367 | -8.2 |
| 79. | Brenizer-Marietta Brewing Company | 20,000 | 20,000 | 0.0 |
| 80. | Geyer Bros. Brewing Company | 19,500 | 19,000 | 2.6 |
| 81. | Effinger Brewing Company | 19,000 | 19,000 | 0.0 |
| 82. | Hawkeye City Brewing Company | 10,000 | 10,000 | 0.0 |
| 83. | Berlin Brewing Company | 9,976 | 10,000 | -0.2 |
| 84. | American Brewing Company, Ltd. (Hawaii) | 9,000 | 1,471 | 511.6 |
| | | | 12,000 | -25.0 |

1 Combined Pabst-Blatz operations.
2 Combined C. Schmidt-Schmidt operations.
3 Combined Brewers, Atlas, Schoenhofen-Edelweiss operations.
4 Combined Pfeiffer, Jacob Schmidt operations.
5 Combined Heileman-Kingsbury operations.
N.L.--Not listed.

SOURCE: BREWERS' JOURNAL AND
* ANNUAL REPORT

## 1960 SALES OF BEVERAGE COMPANIES

(In terms of barrels of 31 gallons)

| RANK | | 1960 | 1959 | % Change 1959-60 |
|---|---|---|---|---|
| 1. | Anheuser-Busch, Inc. | 8,477,000 | 8,044,736 | 5.1 |
| 2. | Jos. Schlitz Brewing Co. | 5,494,000 | 5,863,000 | - 3.9 |
| 3. | Falstaff Brewing Corp. | 4,915,030 | 4,750,000 | 3.5 |
| 4. | Carling Brewing Co. | 4,822,075 | 4,418,484 | 9.1 |
| 5. | Pabst Brewing Co. | 4,740,000* | 4,500,000 | 5.3 |
| 6. | P. Ballantine & Sons | 4,468,893 | 4,324,543 | 3.3 |
| 7. | Theo. Hamm Brewing Corp.[1] | 3,907,040 | 3,551,859 | 10.0 |
| 8. | The F. & M. Schaefer Brewing Co. | 3,293,500 | 3,450,000 | - 4.7 |
| 9. | Lieberman Breweries, Inc. | 2,550,348 | 2,577,543 | - 0.7 |
| 10. | Miller Brewing Co. | 2,376,343 | 2,358,976 | 0.7 |
| 11. | Lucky Lager Brewing Co.[2] | 2,168,000 | 2,180,000 | - 0.6 |
| 12. | The Hirsh Brewery Co. | 2,075,475 | 2,110,947 | - 1.7 |
| 13. | Adolph Coors Co. | 1,907,238 | 1,648,874 | 15.7 |
| 14. | C. Schmidt & Sons, Inc. | 1,682,413 | 1,731,604 | - 4.1 |
| 15. | Drewrys Ltd., U.S.A., Inc. | 1,610,000 | 1,678,488 | - 4.1 |
| 16. | Olympia Brewing Co. | 1,444,893 | 1,413,000 | 2.3 |
| 17. | Pfeil Bros. | 1,440,788 | 1,331,000 | + 8.2 |
| 18. | National Brewing Co. | 1,333,345 | 1,362,000 | - 2.1 |
| 19. | Jacob Ruppert | 1,305,000 | 1,456,000 | -10.4 |
| 20. | Duquesne Brewing Co. of Pittsburgh | 1,060,000* | 1,108,000 | - 3.6 |
| 21. | Pearl Brewing Co. | 1,023,010* | 967,581 | 5.7 |
| 22. | Jackson Brewing Co. | 949,668 | 961,000 | - 1.2 |
| 23. | International Breweries, Inc. | 918,000 | 932,000 | - 1.5 |
| 24. | Pfeiffer Brewing Co. | 914,494 | 899,826 | 1.7 |
| 25. | Lone Star Brewing Co. | 895,114 | 805,794 | 11.1 |
| 26. | Narragansett Brewing Co. | 893,548 | 906,734 | - 1.2 |
| 27. | Burgermeister Brewing Co. | 891,324 | 774,000 | + 0.3 |
| 28. | Pittsburgh Brewing Co. | 886,000 | 885,848 | 0.2 |
| 29. | Genesee Brewing Co. | 885,000 | 888,000 | - 0.4 |
| 30. | Associated Brewing Co. | 880,000 | 698,000 | 23.8 |
| 31. | Minneapolis Brewing Co. | 444,000 | 848,000 | 3.1 |
| 32. | C. Hellmann Brewing Co. | 446,000 | 843,351 | 0.4 |
| 33. | G. Krueger Brewing Co. | 551,250 | 535,000 | 3.0 |
| 34. | Maier Brewing Co. | 533,346 | 436,011 | 22.3 |
| 35. | West End Brewing Co. | 446,000 | 441,000 | 1.4 |
| 36. | Goebel Brewing Co. | 303,346 | 340,285 | -27.3 |
| 37. | H.K. Ebsta Brewing Co. | 383,697 | 447,000 | -13.7 |
| 38. | Henry F. Ortlieb Brewery Co. | 344,000 | --- | |
| 39. | I & S Brewing Co. | 333,893 | 171,145 | 95.0 |
| 40. | Regal Pale Brewing Co. | 312,534 | 351,843 | -11.2 |
| 41. | Latrobe Brewing Co. | 280,000 | --- | |
| 42. | Erie Brewing Co. | 237,477 | 330,337 | -28.4 |
| 43. | Hamm-Beverage Breweries | 232,000 | 320,000 | -28.9 |
| 44. | Acme Brewing Co. | 196,388 | 211,936 | - 7.1 |
| 45. | Blitz-Weinhard Co. | 188,000 | 177,000 | 6.2 |
| 46. | The Lion, Inc. - Gibbons Brewery | 187,000 | 211,385 | -11.5 |
| 47. | Fox Head Brewing Co. | 186,000 | 211,046 | -11.9 |
| 48. | Louis F. Bauweiler's Sons | 183,777 | 197,857 | - 7.1 |
| 49. | Arizona Brewing Co. | 166,200* | 167,164 | - 0.6 |
| 50. | The Old Reading Brewery, Inc. | 160,000 | 171,000 | - 6.4 |
| 51. | Great Falls Breweries, Inc. | 161,329 | 134,710 | 3.4 |
| 52. | Independent Milwaukee Brewery | 159,000 | 161,000 | - 1.4 |
| 53. | Gottshins Brewing Corp. | 152,104 | 133,104 | 1.9 |
| 54. | Van Merritt Brewing Co. | 134,007 | 131,432 | 1.4 |
| 55. | Grace Bros. Brewing Co. | 122,172 | 77,000 | 58.7 |
| 56. | Rockford Brewing Co. | 121,699* | 134,000 | - 9.2 |
| 57. | Baier Brewing Co. | 108,000 | --- | |
| 58. | Beach Brewing Co. | 101,642 | 101,396 | 0.88 |
| 59. | Meister Brewing Co. | 96,910 | 98,000 | - 2.0 |
| 60. | Mull Brewing Co. | 94,300* | 104,300 | - 9.6 |
| 61. | Eagle Brewing Co. | 91,300 | 92,000 | - 0.3 |
| 62. | Jones Brewing Co. | 83,000 | 83,100 | 0.4 |
| 63. | Pearl Rock Brewery | 85,000 | 87,000 | - 2.3 |
| 64. | Minis Brewing Co. | 83,713 | 86,139 | - 2.8 |
| 65. | Wm. Gretz Brewing Co.[3] | 83,000 | 101,784 | -18.4 |
| 66. | Minneola Brewing Co. | 81,000* | 84,000 | - 3.1 |
| 67. | Jacob Leinenkugel Brewing Co. | 76,400 | 77,000 | - 1.1 |
| 68. | Diamond Spring Brewery | 73,000 | 80,000 | - 8.8 |
| 69. | Tivoli Brewing Co. | 67,100* | 84,400 | -20.5 |
| 70. | Fehrenbacher & Schmidt Brewing Co. | 65,375 | 66,300 | - 1.4 |
| 71. | Centre Brewing Co. | 54,000 | 62,012 | - 9.8 |
| 72. | Oshkosh Brewing Co. | 54,000 | 59,281 | - 8.9 |
| 73. | Lake-Shore Bay Brewing Co. | 49,000 | 48,416 | + 0.3 |
| 74. | Peninsular Brewing Co. | 49,000 | 49,488 | - 0.4 |
| 75. | Geo. Walter Brewing Co. | 39,329 | 39,105 | 1.1 |
| 76. | Topica Brewing Co. | 33,296 | 35,897 | - 6.2 |
| 77. | August Schell Brewing Co. | 31,344 | 29,222 | 7.3 |
| 78. | Schoenling Brewing Co. | 31,493* | 36,944 | -14.8 |
| 79. | Silver Springs Brewery Co. | 24,000 | --- | |
| 80. | Spoetzl Brewery | 23,670 | 20,300 | 16.6 |
| 81. | Shiner Leader Brewing Co. | 21,146 | 22,252 | - 5.3 |
| 82. | Berlin Brewing Co. | 10,000 | 9,764 | 2.3 |
| 83. | Marathon City Brewing Co. | 9,346 | 9,934 | - 5.9 |
| 84. | Effinger Brewing Co. | 9,343 | 10,040 | - 7.0 |

1 Combined Hamm-Goetzer operations
2 Combined Lucky Lager-Fisher operations
3 11 months production

SOURCE: BEVERAGE BUSINESS AND
* AMERICAN BREWER

1961 SALES OF BRANDS CONTAINING

(In terms of barrels of 31 gallons)

| Rank | | 1961 | 1960 | % Change 1960-61 |
|---|---|---|---|---|
| 1. | Anheuser-Busch, Inc. [1] | 9,300,3[illegible] | 8,672,000 | 7.2 |
| 2. | Jos. Schlitz Brewing Co. [2] | 5,775,644 | 5,554,000 | 3.9 |
| 3. | Pabst Brewing Co. | 5,230,[illegible] | 4,960,000 | 5.4 |
| 4. | Falstaff Brewing Corp. | 5,120,000 | 4,915,000 | 4.2 |
| 5. | Carling Brewing Co. | 5,067,323 | 4,822,973 | 5.1 |
| 6. | P. Ballantine & Sons [3] | 5,015,000 | 4,630,000 | 8.4 |
| 7. | Theo. Hamm Brewing Co. [4] | 3,734,344 | 3,537,047 | 5.6 |
| 8. | The F. & M. Schaefer Brewing Co. [5] | 3,446,350 | 3,280,300 | 5.1 |
| 9. | Liebmann Breweries, Inc. | 2,587,344 | 2,550,348 | 1.5 |
| 10. | Miller Brewing Co. [6] | 2,350,[illegible] | 2,376,343 | -1.1 |
| 11. | Adolph Coors Co. | 2,301,033 | 1,987,138 | 15.8 |
| 12. | Lucky Lager Brewing Co. | 2,230,000 | 2,160,000 | 3.2 |
| 13. | The Stroh Brewery Co. | 2,029,300 | 2,073,475 | -2.1 |
| 14. | C. Schmidt & Sons, Inc. [7] | 1,834,342 | 1,832,413 | 0.1 |
| 15. | Heileman Brewing Co. | 1,650,813 | 1,616,000 | 2.1 |
| 16. | Olympia Brewing Co. | 1,550,[illegible] | 1,496,193 | 3.6 |
| 17. | Pearl Brewing Co. [8] | 1,431,[illegible] | 1,083,[illegible] | 32.1 |
| 18. | National Brewing Co. | 1,375,000 | 1,355,343 | 1.5 |
| 19. | Piel Bros. | 1,360,000 | 1,436,388 | -5.3 |
| 20. | Jacob Ruppert | 1,[illegible],000 | 1,[illegible],000 | -7.7 |
| 21. | Narragansett Brewing Co. [9] | 1,[illegible],000 | 893,388 | 32.4 |
| 22. | Duquesne Brewing Co. | 1,007,341 | 1,[illegible],000 | -7.8 |
| 23. | Jackson Brewing Co. | 996,[illegible] | 949,000 | 5.0 |
| 24. | Pfeiffer Brewing Co. | 932,[illegible] | 934,000 | -1.0 |
| 25. | Lone Star Brewing Co. | 900,000 | 885,[illegible] | 2.0 |
| 26. | Genesee Brewing Co. | 888,000 | 880,000 | 0.9 |
| 27. | International Breweries, Inc. | 844,000 | 880,000 | -3.9 |
| 28. | Pittsburgh Brewing Co. | 700,000 | 880,000 | -2.3 |
| 29. | Rheingold Brewing Co. | 727,998 | 891,[illegible] | -18.3 |
| 30. | Minneapolis Brewing Co. | 793,000 | 862,000 | -8.7 |
| 31. | G. Leinenkugel Brewing Co. | 863,010 | 848,000 | 1.8 |
| 32. | West End Brewing Co. | 816,000 | 685,000 | 9.3 |
| 33. | Weiss Brewing Co. | 644,[illegible] | 333,[illegible] | 7.4 |
| 34. | Atlantic Brewing Co. | 634,[illegible] | --- | |
| 35. | F. & B. Brewing Co. | 3[illegible],[illegible] | 333,000 | -5.1 |
| 36. | Latrobe Brewing Co. | 310,000 | 280,000 | 10.7 |
| 37. | Goebel Brewing Co. | 303,[illegible] | 293,344 | 3.4 |
| 38. | Duquesne Brewing Co. | 288,000 | 270,000 | 1.0 |
| 39. | Fehr Brewing Co. | 283,000 | 287,477 | 1.9 |
| 40. | Esslinger's Inc. | 2[illegible],[illegible] | 287,[illegible] | 12.1 |
| 41. | Regal Pale Brewing Co. | 222,7[illegible] | 332,[illegible] | -[illegible].3 |
| 42. | Altes Brewing Co. | 219,[illegible] | 220,[illegible] | -1.4 |
| 43. | Blitz-Weinhard Co. | 216,[illegible] | 188,000 | 14.9 |
| 44. | Northwest Brewing Co. | 187,[illegible] | 190,000 | -1.4 |
| 45. | The Lion, Inc. - Gibbons Brewery | 187,[illegible] | 182,000 | |
| 46. | Louis F. Hauenstein's Sons | 173,700 | 183,777 | -5.5 |
| 47. | Old Reading Brewery, Inc. | 171,000 | 180,000 | -5.0 |
| 48. | Schmidtsches Gebrauhaus | 166,[illegible] | 173,[illegible] | -3.3 |
| 49. | Arizona Brewing Co. | 161,[illegible] | 180,[illegible] | -[illegible].2 |
| 50. | Pan Hand Brewing Co. | 159,[illegible] | 180,000 | -11.4 |
| 51. | Genesee Brewing Co. | 158,[illegible] | 122,[illegible] | 29.9 |
| 52. | Gottshalk Brewing Co. | 148,[illegible] | 139,[illegible] | 12.1 |
| 53. | Independent Milwaukee Brewery | 139,[illegible] | 139,000 | -2.2 |
| 54. | Great Falls Breweries, Inc. | 132,[illegible] | 141,[illegible] | -6.8 |
| 55. | Van Merritt Brewing Co. | 130,638 | 136,[illegible] | -4.7 |
| 56. | Dunkley Brewing Co. | 131,000 | 131,[illegible] | -0.1 |
| 57. | Chas. G. Raier Co. | 107,000 | 108,000 | -0.9 |
| 58. | Bosch Brewing Co. | 100,[illegible] | 101,[illegible] | -0.7 |
| 59. | Jones Brewing Co. | 93,[illegible] | 85,[illegible] | 9.4 |
| 60. | Hull Brewing Co. | 91,[illegible] | 94,[illegible] | -3.0 |
| 61. | W. G. Yuengling & Son | 85,[illegible] | 87,[illegible] | -2.3 |
| 62. | De Bolo Brewing Co. | 80,[illegible] | 79,[illegible] | +[illegible].3 |
| 63. | Eagle Brewing Co. | 82,[illegible] | 91,[illegible] | -9.5 |
| 64. | Weiter Brewing Co. (Colorado) | 79,[illegible] | 84,[illegible] | -5.8 |
| 65. | Duluth Brewery | 75,[illegible] | 70,[illegible] | 7.4 |
| 66. | J. Leinenkugel Brewing Co. | 73,[illegible] | 74,[illegible] | -1.3 |
| 67. | Diamond Spring Brewery | 69,[illegible] | 73,[illegible] | -5.5 |
| 68. | Perfection & Schmidt Brewing Co. | 66,[illegible] | 69,[illegible] | -1.1 |
| 69. | Tivoli Brewing Co. | 60,[illegible] | 67,[illegible] | -1.1 |
| 70. | Jos. Baker Brewing Co. | 56,[illegible] | 64,[illegible] | 12.3 |
| 71. | Gottshalk Brewing Co. | 54,[illegible] | 56,[illegible] | 3.1 |
| 72. | Peacemaker Brewing Co. | 45,[illegible] | 47,[illegible] | -3.3 |
| 73. | Hamm's Brewing Co. | 44,[illegible] | 34,[illegible] | 28.8 |
| 74. | Potosi Brewing Co. | 43,[illegible] | --- | |
| 75. | Grand-Dawes Bay Brewing Co. | 38,[illegible] | 48,[illegible] | -18.3 |
| 76. | Geo. Walter Brewing Co. | 38,[illegible] | 39,[illegible] | -2.7 |
| 77. | Stevens Pt. Brewery | 36,[illegible] | 35,[illegible] | 1.1 |
| 78. | Lorain Brewing Co. | 34,[illegible] | 44,[illegible] | -23.0 |
| 79. | Pennsylvania Brewing Co. | 34,[illegible] | --- | |
| 80. | Fox Head Lincoln Co. | 33,[illegible] | 33,[illegible] | |
| 81. | The Peoples Brewing Co. | 31,[illegible] | 32,[illegible] | -4.8 |
| 82. | Schuyler Bier Brewing Co. | 31,[illegible] | 32,[illegible] | -43.9 |
| 83. | Worcester Brewing Co. | 29,[illegible] | --- | |
| 84. | Schoenling Brewing Co. | 29,[illegible] | 31,[illegible] | -6.4 |
| 85. | Spoetzl Brewing Co. | 23,[illegible] | 23,[illegible] | 1.1 |
| 86. | Shoreloader Brewing Co. | 21,[illegible] | 21,[illegible] | 1.0 |
| 87. | Northern Brewing Co. | 19,[illegible] | --- | |
| 88. | Bavia Brewing Co. | 18,[illegible] | 17,[illegible] | 1.0 |
| 89. | Blue Lake Brewing Co. | 13,[illegible] | --- | |
| 90. | Berlin Brewing Co. | 12,[illegible] | 10,[illegible] | 16.0 |
| 91. | Effinger Brewing Co. | 9,[illegible] | 9,[illegible] | 3.0 |
| 92. | Van Rivers Beverage Co. | 9,[illegible] | --- | |
| 93. | Marathon City Brewing Co. | 9,[illegible] | 9,[illegible] | -4.0 |
| 94. | Geyer Bros. Brewing Co. | 8,[illegible] | 9,[illegible] | -4.0 |
| 95. | Centralia Brewing Co. | 8,[illegible] | 6,[illegible] | 33.7 |
| 96. | Marshfield Brewing Co. | 7,[illegible] | --- | |
| 97. | Dakota Making & Brewing Co. | 7,[illegible] | --- | |

1 Includes Mixed Plant
2 Does not include Burgermeister Brewing Co.
Burgermeister reported separately.
3 Duluth Reclosed.
4 Includes 1960 Gunther sales
5 Includes 1961 Standard sales
Does not include Continental, reported separately
6 Includes 1961 Meister-Brau sales
7 Includes 1961 Krueger sales

SOURCES: NATIONAL BREWERY ASS
* AMERICAN BREWER

1943 Sales of Leading Companies
(In terms of barrels of 31 gal. each)

| Rank | | 1942 | 1941 | % Change 1941/42 |
|---|---|---|---|---|
| 1. | Anheuser-Busch, Inc. | 9,834,834 | 8,388,388 | 8.3 |
| 2. | Jos. Schlitz Brewing Co. | 5,847,277 | 5,771,241 | 10.1 |
| 3. | Pabst Brewing Co. | 5,414,000[1,3] | 5,210,548 | 11.8 |
| 4. | Carling Brewing Co. | 5,314,000 | 5,047,143 | 6.1 |
| 5. | Falstaff Brewing Corp. | 5,313,000[3] | 5,128,848 | 3.8 |
| 6. | P. Ballantine & Sons | 5,150,000 | 5,113,848 | 6.1 |
| 7. | The F. & M. Schaefer Brewing Co. | 3,777,000 | 3,666,338 | 6.1 |
| 8. | Theo. Hamm Brewing Co. | 3,725,000[3] | 3,776,344 | 6.1 |
| 9. | Liebmann Breweries, Inc. | 3,542,000 | 3,547,344 | 6.1 |
| 10. | Miller Brewing Co. | 3,535,000[3] | 3,340,178[4] | 6.1 |
| 11. | Adolph Coors Co. | 3,773,000 | 3,388,888 | 10.1 |
| 12. | Lucky Lager Brewing Co. | 3,168,000 | 3,138,888 | 6.1 |
| 13. | The Stroh Brewery Co. | 3,000,000[3] | 2,838,888 | 6.1 |
| 14. | Rheingold, N.Y.C., Inc. | 2,950,000 | 2,938,888 | 10.1 |
| 15. | C. Schmidt & Sons | 2,677,000[3] | 2,888,842 | 6.1 |
| 16. | Olympia Brewing Co. | 1,741,000 | 1,338,388 | 6.1 |
| 17. | Pearl Brewing Co. | 1,641,000[3,7] | 1,631,888 | 6.1 |
| 18. | National Brewing Co. | 1,393,000[3] | 1,375,888 | 6.1 |
| 19. | Joseph Dupont | 1,384,000 | 1,388,888 | 6.1 |
| 20. | Narragansett Brewing Co. | 1,338,000[3] | 1,888,888 | 6.1 |
| 21. | Jackson Brewing Co. | 1,281,000[3] | 1,388,888 | 6.1 |
| 22. | Duquesne Brewing Co. | 1,888,888 | 1,888,888 | 6.1 |
| 23. | Grain Belt Brewing Co. | 888,888 | 888,888 | 6.1 |
| 24. | Associated Breweries, Inc. | 888,888 | 888,888 | 6.1 |
| 25. | Lone Star Brewing Co. | 888,888 | 888,888 | 6.1 |
| 26. | Continental Baking Co., Inc. | 888,888 | 888,888 | 6.1 |
| 27. | Fitzgerald Brewing Co. | 888,888 | 888,888 | 6.1 |
| 28. | Minneapolis Brewing Co. | 888,888 | 888,888 | 6.1 |
| 29. | C. Hoffmann Brewing Co. | 888,888 | 888,888 | 6.1 |
| 30. | Iron Hat Brewing Co. | 888,888 | 888,888 | 6.1 |
| 31. | Monumental Brewing Co., Inc. | 888,888 | 888,888 | 6.1 |
| 32. | Duluth Brewing Co. | 888,888 | 888,888 | 6.1 |
| 33. | Canadian Ace Brewing Co. | 888,888 | 888,888 | 6.1 |
| 34. | Atlantic Brewing Co. | 888,888 | 888,888 | 6.1 |
| 35. | Henry F. Ortlieb Brewery Co. | 888,888 | 888,888 | 6.1 |
| 36. | Gunther Brewing Co. | 888,888 | 888,888 | 6.1 |
| 37. | Stegmaier Brewing Co. | 888,888 | 888,888 | 6.1 |
| 38. | I & O Brewing Co. | 888,888 | 888,888 | 6.1 |
| 39. | Grand Brewing Co. | 888,888 | 888,888 | 6.1 |
| 40. | Erie Brewing Co. | 888,888 | 888,888 | 6.1 |
| 41. | Independent Brewing Co. | 888,888 | 888,888 | 6.1 |
| 42. | Monarch Brewing Co. | 888,888 | 888,888 | 6.1 |
| 43. | Monticello Malt | 888,888 | 888,888 | 6.1 |
| 44. | Southern Pr., Inc. | 888,888 | 888,888 | 6.1 |
| 45. | Southern Brewing Co. | 888,888 | 888,888 | 6.1 |
| 46. | Northwestern Brewing Co. | 888,888 | 888,888 | 6.1 |
| 47. | The Lion, Inc. | 888,888 | 888,888 | 6.1 |
| 48. | The Old Reading Brewery | 888,888 | 888,888 | 6.1 |
| 49. | Associated Brewing Corp. | 888,888 | 888,888 | 6.1 |
| 50. | Hudepohl Brewing Co. | 888,888 | 888,888 | 6.1 |
| 51. | Grace Bros. Brewing Co. | 888,888 | 888,888 | 6.1 |
| 52. | Van Merritt Brewing Co. | 888,888 | 888,888 | 6.1 |
| 53. | Jacob Ruppert Brewery | 888,888 | 888,888 | 6.1 |
| 54. | Grand Falls Bleacheries, Inc. | 888,888 | 888,888 | 6.1 |
| 55. | Walter Brewing Co. | 888,888 | 888,888 | 6.1 |
| 56. | Hamilton Brewing Co. | 888,888 | 888,888 | 6.1 |
| 57. | Charles D. Gider Co. | 888,888 | 888,888 | 6.1 |
| 58. | Frank Brewing Co. | 888,888 | 888,888 | 6.1 |
| 59. | Hoffman Brewing Co. | 888,888 | 888,888 | 6.1 |
| 60. | Regal Brewing Co. | 888,888 | 888,888 | 6.1 |
| 61. | Lehigh Brewing Co. | 888,888 | 888,888 | 6.1 |
| 62. | Joseph Leinenkugel Brewing Co. | 888,888 | 888,888 | 6.1 |
| 63. | Wagner Brewing Co. | 888,888 | 888,888 | 6.1 |
| 64. | Trenton Brewing Co. | 888,888 | 888,888 | 6.1 |
| 65. | Eagle Brewing Co. | 888,888 | 888,888 | 6.1 |
| 66. | Silver Brewing Co. | 888,888 | 888,888 | 6.1 |
| 67. | Gibbons Brewing Co. | 888,888 | 888,888 | 6.1 |
| 68. | Columbia Brewing Co. | 888,888 | 888,888 | 6.1 |
| 69. | Pacific Brewing Co. | 888,888 | 888,888 | 6.1 |
| 70. | Peninsula & Schmidt Brewing Co. | 888,888 | 888,888 | 6.1 |
| 71. | Pfeiffer Brewing Co. | 888,888 | 888,888 | 6.1 |
| 72. | Pfeiffer Brewing Co. | 888,888 | 888,888 | 6.1 |
| 73. | Portsmouth Brewing Co. | 888,888 | 888,888 | 6.1 |
| 74. | Rochester Brewing Co. | 888,888 | 888,888 | 6.1 |
| 75. | Geo. Ehret Brewing Co. | 888,888 | 888,888 | 6.1 |
| 76. | Saint-Croix Ale Brewing Co. | 888,888 | 888,888 | 6.1 |
| 77. | Rainier Pacific Brewing Co. | 888,888 | 888,888 | 6.1 |
| 78. | Standard Brewing Co. | 888,888 | 888,888 | 6.1 |
| 79. | West Bend Lithia Co. | 888,888 | 888,888 | 6.1 |
| 80. | Peoples Brewing Co. | 888,888 | 888,888 | 6.1 |
| 81. | Imperial Brewing Co. | 888,888 | 888,888 | 6.1 |
| 82. | Spokane Brewing Co. | 888,888 | 888,888 | 6.1 |
| 83. | Independent Brewing Co. | 888,888 | 888,888 | 6.1 |
| 84. | Schmidt Brewing Co. | 888,888 | 888,888 | 6.1 |
| 85. | Schmidt Brewing Co. | 888,888 | 888,888 | 6.1 |
| 86. | Wisconsin Brewing Co. | 888,888 | 888,888 | 6.1 |
| 87. | Wisconsin Brewing Co. | 888,888 | 888,888 | 6.1 |
| 88. | Wisconsin Brewing Co. | 888,888 | 888,888 | 6.1 |
| 89. | Wisconsin Brewing Co. | 888,888 | 888,888 | 6.1 |
| 90. | Wisconsin Brewing Co. | 888,888 | 888,888 | 6.1 |
| 91. | Wisconsin Brewing Co. | 888,888 | 888,888 | 6.1 |
| 92. | Wisconsin Brewing Co. | 888,888 | 888,888 | 6.1 |
| 93. | Wisconsin Brewing Co. | 888,888 | 888,888 | 6.1 |
| 94. | Wisconsin Brewing Co. | 888,888 | 888,888 | 6.1 |
| 95. | Wisconsin Brewing Co. | 888,888 | 888,888 | 6.1 |
| 96. | Wisconsin Brewing Co. | 888,888 | 888,888 | 6.1 |
| 97. | Wisconsin Brewing Co. | 888,888 | 888,888 | 6.1 |
| 98. | Wisconsin Brewing Co. | 888,888 | 888,888 | 6.1 |
| 99. | Wisconsin Brewing Co. | 888,888 | 888,888 | 6.1 |
| 100. | Wisconsin Brewing Co. | 888,888 | 888,888 | 6.1 |

1 Does not include Independent Brewing Co.
2 Name changed from Duke Ale Brewing Co.
3 1942, estimated.
4 1941, estimated.
5 Does not include Distillers, reported separately.
6 Includes 2 mos. of Pfeiffer.
7 Includes Quaker Maid Brewing Co.
8 Formerly Phoenix Brewing Co.

Source:
Beverage Industry and
Associated Brewers
Trade Journals World
Overseas Agricultural Data

## 1963 SALES OF BREWING COMPANIES

(In terms of barrels of 31 gallons)

| RANK | | 1963 | 1962 | % Change 1962-1963 |
|---|---|---|---|---|
| 1. | Anheuser-Busch, Inc. | 9,797,224 | 9,834,634* | -0.4 |
| 2. | Jos. Schlitz Brewing Co. | 7,814,253 | 9,849,277 | -11.9 |
| 3. | Pabst Brewing Company | 6,672,040* | 5,847,787 | 14.1 |
| 4. | Carling Brewing Co. | 5,401,141 | 5,354,048 | 0.8 |
| 5. | Falstaff Brewing Corp. | 5,348,176 | 5,350,008 | -0.4 |
| 6. | P. Ballantine & Sons | 4,493,040 | 4,550,000 | -1.2 |
| 7. | The F. & M. Schaefer Brewing Co. | 4,042,393 | 3,777,948 | 7.0 |
| 8. | Theo. Hamm Brewing Co. | 3,826,400 | 3,724,600 | 2.7 |
| 9. | Adolph Coors Co. | 3,053,910* | 2,773,890 | 10.1 |
| 10. | Liebmann Breweries, Inc. | 3,018,000 | 2,992,000 | 0.9 |
| 11. | Miller Brewing Co. | 2,917,000***1 | 2,821,000***1 | 3.4 |
| 12. | Brewrys Ltd. U.S.A., Inc. | 2,631,563* | 1,950,000 2 | 35.4 |
| 13. | General Brewing Corp. | 2,645,000*** | 2,160,000 | -1.5 |
| 14. | The Stroh Brewery Co. | 2,045,350 | 2,010,807 | 0.4 |
| 15. | C. Schmidt & Sons | 1,940,931* | 1,871,474 | 3.7 |
| 16. | Olympia Brewing Co. | 1,775,000 | 1,741,643* | 1.9 |
| 17. | Pearl Brewing Co. | 1,558,631 | 1,476,303 | 5.2 |
| 18. | National Brewing Co. | 1,400,567 | 1,381,467 | 1.3 |
| 19. | Jacob Ruppert | 1,270,000 | 1,270,000* | 3.0 |
| 20. | Narragansett Brewing Co. | 1,266,507* | 1,160,563 | 9.1 |
| 21. | Associated Brewing Co. | 1,160,000***4,3 | 948,107* | 22.3 |
| 22. | Genesee Brewing Co. | 1,100,000 | 963,000 | 14.0 |
| 23. | Jackson Brewing Co. | 1,035,000*** | 1,032,000 | 0.2 |
| 24. | Duquesne Brewing Co. | 1,010,243* | 1,003,018 | 0.7 |
| 25. | Lone Star Brewing Co. | 983,000*** | 921,898* | 6.8 |
| 26. | Pittsburgh Brewing Co. | 826,000 | 772,300* | 7.0 |
| 27. | G. Heileman Brewing Co. | 813,000* | 684,879 | 18.5 |
| 28. | International Breweries, Inc. | 800,000 | 826,000 | -3.1 |
| 29. | Minneapolis Brewing Co. | 760,000*** | 730,000 | 4.1 |
| 30. | Hoter Brewing Co. | 597,935 | 469,852 | 27.1 |
| 31. | West End Brewing Co. | 569,000 | 560,000 | 1.6 |
| 32. | Canadian Ace Brewing Co. | 501,390 | 460,235 | 9.0 |
| 33. | Henry F. Ortlieb Brewery Co. | --- | 362,000 | --- |
| 34. | Blitz-Weinhard Co. | 297,215 | 232,256* | 28.0 |
| 35. | Latrobe Brewing Co. | 284,000*** | 317,000 | -10.4 |
| 36. | Erie Brewing Co. | 279,745 | 284,453* | -1.8 |
| 37. | Stegmaier Brewing Co. | 262,000*** | 288,000 | -9.0 |
| 38. | Gerlacher Brewing Co. | 210,000*** | 184,762* | 14.9 |
| 39. | Corbel Brewing Co. | 215,000*** | 267,000** | -19.0 |
| 40. | Brewrilor Brewing Corp. | 199,000*** | 172,288 | 15.6 |
| 41. | Old Reading Brewery | 194,191 | 174,500* | 11.3 |
| 42. | The Lion, Inc. | 188,000*** | 175,063* | 7.4 |
| 43. | Grace Bros. Brewing Co. | 135,471* | 142,665 | -4.9 |
| 44. | Sunshine Brewing Co. | 134,000*** | 119,588 | 10.8 |
| 45. | Yon Moritz Brewing Co. | --- | 133,408 | --- |
| 46. | Walter Brewing Co. | 126,394* | 126,393* | 0.0 |
| 47. | Great Falls Breweries, Inc. | 120,300 | 124,254 | -3.2 |
| 48. | Dubois Brewing Co. | 109,000*** | 83,614 | 30.4 |
| 49. | Charles D. Hoter Co. | --- | 106,125 | --- |
| 50. | Beach Brewing Co. | 96,621 | 100,469 | -3.8 |
| 51. | Blatz Brewing Co. | 94,814* | 83,214* | 10.3 |
| 52. | Huber Brewing Co. | 89,919 | 66,695 | 34.8 |
| 53. | Jones Brewing Co. | 83,658 | 93,893* | -10.9 |
| 54. | Fred Koch Brewery | 80,500 | 80,500 | 0 |
| 55. | Jacob Leinenkugel Brewing Co. | 75,266* | 73,048 | 3.0 |
| 56. | Tivoli Brewing Co. | --- | 62,684 | --- |
| 57. | Oshkosh Brewing Co. | 55,814 | 53,907 | 3.1 |
| 58. | Fehrenbach & Schmidt Brewing Co. | 50,464* | 45,000* | 12.5 |
| 59. | Potosi Brewing Co. | 45,100 | 45,317* | -0.1 |
| 60. | Pfleger Brewing Co. | --- | 39,804 | --- |
| 61. | Oconto Brewing Co. | 37,131 | 36,665* | 1.2 |
| 62. | Bartels Brewing Co. | --- | 36,000 | --- |
| 63. | Geo. Walter Brewing Co. | 34,164* | 35,748 | -4.4 |
| 64. | Bahr-Green Bay Brewing Co. | 34,482 | 35,099 | -3.1 |
| 65. | Stevens Point Brewing Co. | 33,387 | 34,000 | -2.0 |
| 66. | Dubuque Star Brewing Co. | 31,626 | 31,504 | +0.3 |
| 67. | Four-Roch Brewing Co. | --- | 30,169* | --- |
| 68. | Peoples Brewing Co. | 29,064* | 29,356* | -1.0 |
| 69. | West Bend Lithia Co. | 29,848 | 30,000 | -3.2 |
| 70. | Silver Springs Brewing Co. | 26,000* | --- | --- |
| 71. | Schoenling Brewing Co. | --- | 27,700 | --- |
| 72. | Imperial Brewery | 20,613 | 23,523 | -12.4 |
| 73. | Northern Brewing Co. | 18,218 | 18,519* | -1.6 |
| 74. | Blue Lake Brewing Co. | 16,649 | 16,634* | 0.1 |
| 75. | Whitelander Brewing Co. | 16,175 | 17,795* | -9.1 |
| 76. | Dakota Malting & Brewing Co. | 13,315 | 8,013* | 93.1 |
| 77. | Geyer Bros. Brewing Co. | 11,660 | 10,887 | 7.1 |
| 78. | Berlin Brewing Co. | 10,000 | 9,430 | 6.0 |
| 79. | Two Rivers Beverage Co. | 9,200 | 10,000* | -8.0 |
| 80. | Effinger Brewing Co. | 9,000* | 9,309* | -3.3 |
| 81. | Fountain Brewing Co. | 8,998 | 9,150 | -1.7 |
| 82. | Marshfield Brewing Co. | 8,427 | 8,230 | 1.9 |
| 83. | Hawthorn City Brewing Co. | 6,940* | 8,383* | -17.2 |
| 84. | Honolulu Soda Brewery & Ice Co., Ltd. | 2,634 | 2,303* | 9.9 |

1 Includes Gretzliana and other brands.
2 Includes three months of Pisis.
3 1963, estimated.
4 Pfeiffer, Schmidt, and E & B.

SOURCES:
**BEVERAGE INDUSTRY ANN
*AMERICAN BREWER
***THE BREWING WORLD
****BEER WHOLESALERS' ASSN

## 1944 SALES OF BREWING COMPANIES

(In terms of barrels of 31 gallons)

| NAME | 1944 | 1943 | % change 1943-44 |
|---|---|---|---|
| 1. Anheuser-Busch, Inc. | 10,399,839 * | 9,897,276 | 5.1 |
| 2. Jos. Schlitz Brewing Co. | 8,454,336 | 7,8[illegible] | 8.3 |
| 3. Pabst Brewing Co. | 7,[illegible],068 | 6,872,000 | 11.4 |
| 4. Falstaff Brewing Corp. | 5,819,859 | 5,[illegible],178 | 4.9 |
| 5. Carling Brewing Co. | 5,775,000 1 | 5,481,141 | 1.7 |
| 6. The F. & M. Schaefer Brewing Co. | 4,444,834 | 4,042,393 | 10.0 |
| 7. P. Ballantine & Sons | 4,413,000 | 4,[illegible],030 | -1.9 |
| 8. Theo. Hamm Brewing Co. | 3,729,000 | 3,826,[illegible]00 | -2.5 |
| 9. Adolph Coors Co. | 3,[illegible],000* | 3,[illegible],000 | 12.8 |
| 10. Miller Brewing Co. | 3,287,016 | 2,920,000 | 12.3 |
| 11. Rheingold Breweries, Inc. | 3,100,340 | 3,018,000 | 2.8 |
| 12. Drewry's Ltd.USA,Inc. | 2,678,00[illegible] | 2,601,563 | 2.9 |
| 13. The Stroh Brewery Co. | 2,285,000**2,4 | 2,045,359 | 11.7 |
| 14. C. Schmidt & Sons, Inc. | 2,200,000 | 1,9[illegible],000 | 13.3 |
| 15. Olympia Brewing Co. | 2,168,000 | 1,775,000 | 22.1 |
| 16. General Brewing Corp. | 1,773,000** | 2,065,000 | -14.9 |
| 17. The National Brewing Co. | 1,702,000** | 1,[illegible],567 | 21.3 |
| 18. Pearl Brewing Co. | 1,692,738 | 1,598,631 | 5.9 |
| 19. Associated Brewing Co. | 1,483,[illegible]** | 1,160,000** | 28.[illegible] |
| 20. Jacob Ruppert, (A Corp.) | 1,[illegible],000 | 1,[illegible],000 | 17.[illegible] |
| 21. Narragansett Brewing Co. | 1,[illegible],000 | 1,[illegible],9[illegible]* | [illegible] |
| 22. The Genesee Brewing Co.,Inc. | 1,[illegible],000 | 1,[illegible],[illegible] | [illegible] |
| 23. Duquesne Brewing Co. of Pittsburgh | 1,[illegible],000 | 1,[illegible],[illegible] | [illegible] |
| 24. Jackson Brewing Co. | 1,[illegible],000 | 1,[illegible],[illegible] | [illegible] |
| 25. G. Heileman Brewing Co., Inc. | [illegible],[illegible]** | 813,[illegible] | [illegible] |
| 26. Lone Star Brewing Co. | 9[illegible],[illegible] | [illegible],[illegible]** | [illegible] |
| 27. Pittsburgh Brewing Co. | [illegible]* | [illegible],[illegible] | [illegible] |
| 28. International Breweries, Inc. | [illegible] | [illegible],[illegible] | [illegible] |
| 29. Minneapolis Brewing Co. — | 800,000* | [illegible],[illegible]* | [illegible] |
| 30. Maier Brewing Co. | 684,742 | [illegible],[illegible] | [illegible] |
| 31. West End Brewing Co. of Utica, N.Y. | 600,000 | [illegible],[illegible] | [illegible] |
| 32. Canadian Ace Brewing Co. | 551,000 | [illegible],[illegible] | [illegible] |
| 33. Blitz-Weinhard Co. | 332,[illegible] | [illegible],[illegible] | [illegible] |
| 34. Erie Brewing Co. | 300,137 | [illegible],[illegible] | [illegible] |
| 35. Old Reading Brewery, Inc. | 285,[illegible] | [illegible],[illegible]* | [illegible] |
| 36. Cortel Brewing Co. | 207,000 | [illegible],[illegible]* | [illegible] |
| 37. Horlacher Brewing Co. | 195,[illegible] | [illegible],[illegible] | [illegible] |
| 38. The Lion, Inc. | [illegible],000 | [illegible],500 | [illegible] |
| 39. Grace Bros. Brewing Co. | [illegible],[illegible]* | [illegible],[illegible]* | [illegible] |
| 40. Van Merritt Brewing Co. | [illegible],[illegible] | [illegible],[illegible]* | [illegible] |
| 41. Walter Brewing Co. | [illegible],[illegible] | [illegible],[illegible] | [illegible] |
| 42. State Brewing Co., Inc. | [illegible],[illegible]* | [illegible],[illegible]* | [illegible] |
| 43. Great Falls Breweries, Inc. | [illegible],[illegible] | [illegible],[illegible] | [illegible] |
| 44. Jos. Huber Brewing Co. | [illegible],[illegible] | [illegible],[illegible] | [illegible] |
| 45. Sunshine Brewing Co. | [illegible],[illegible] | [illegible],[illegible] | [illegible] |
| 46. Jones Brewing Co. | [illegible],[illegible] | [illegible],[illegible] | [illegible] |
| 47. Bosch Brewing Co. | [illegible],[illegible] | [illegible],[illegible] | [illegible] |
| 48. Jacob Leinenkugel Brewing Co. | [illegible],[illegible] | [illegible],[illegible] | [illegible] |
| 49. Oshkosh Brewing Co. | [illegible],[illegible] | [illegible],[illegible] | [illegible] |
| 50. [illegible] & Schmidt Brewing Co. | [illegible],[illegible] | [illegible],[illegible] | [illegible] |
| 51. [illegible] Brewing Co. | [illegible],[illegible] | [illegible],[illegible] | [illegible] |
| 52. [illegible] Point Beverage Co. | [illegible],[illegible] | [illegible],[illegible] | [illegible] |
| 53. Geo. Walter Brewing Co. | [illegible],[illegible] | [illegible],[illegible] | [illegible] |
| 54. [illegible] Bay Brewing Corp. | [illegible],[illegible] | [illegible],[illegible] | [illegible] |
| 55. [illegible] Star Brewing Co. | [illegible],[illegible] | [illegible],[illegible] | [illegible] |
| 56. The Peoples Brewing Co. | [illegible],[illegible]* | [illegible],[illegible] | [illegible] |
| 57. West Bend Lithia Co. | [illegible],[illegible] | [illegible],[illegible] | [illegible] |
| 58. Spoetzl Brewery | [illegible],[illegible] | [illegible],[illegible] | [illegible] |
| 59. Dakota Malting & Brewing Co. | [illegible],[illegible] | [illegible],[illegible] | [illegible] |
| 60. Raythorn Brewing Co. | [illegible],[illegible]* | [illegible],[illegible] | [illegible] |
| 61. Pike Lake Brewing Co. | [illegible],[illegible] | [illegible],[illegible] | [illegible] |
| 62. Rhinelander Brewing Co. | [illegible],[illegible] | [illegible],[illegible] | [illegible] |
| 63. Geyer Bros. Brewing Co. | [illegible],[illegible] | [illegible],[illegible] | [illegible] |
| 64. Effinger Brewing Co. | [illegible],[illegible]* | [illegible],[illegible]* | [illegible] |
| 65. Berlin Brewing Co. | [illegible],[illegible] | [illegible],[illegible] | [illegible] |
| 66. Marshfield Brewing Co. | [illegible],[illegible] | [illegible],[illegible] | [illegible] |
| 67. Honolulu Soda Brewery & Ice Co., Ltd. | [illegible],[illegible] | [illegible],[illegible] | [illegible] |

* - Not Reported

1. Excluding Arizona Brewing, purchased 12-1-44
2. Includes Grobol Brewing Co.
3. Includes 6 months of Sterling Brewers, Inc.
4. 1944, Estimated

SOURCE:
Modern Brewery Age
American Brewer
Brewers Association's Data
Compiled

## CALENDAR YEAR BEER SALES

(31-Gallon Barrels)

| | Packaged | Draught | Total | Per cent of Packaged Beer |
|---|---|---|---|---|
| 1967* | 89,579,642 | 17,395,921 | 106,974,363 | 83.5% |
| 1966 | 86,531,861 | 17,730,638 | 104,262,499 | 83.0 |
| 1965 | 82,618,211 | 17,792,874 | 100,411,085 | 82.5 |
| 1964 | 80,277,500 | 18,222,500 | 98,645,644 | 81.5 |
| 1963 | 76,347,185 | 17,446,818 | 93,794,003 | 81.4 |
| 1962 | 74,128,498 | 17,068,694 | 91,197,192 | 81.3 |
| 1961 | 71,910,648 | 17,117,728 | 89,028,376 | 80.8 |
| 1960 | 70,955,558 | 16,957,289 | 87,912,847 | 80.7 |
| 1959 | 70,308,462 | 17,313,897 | 87,622,359 | 80.2 |
| 1958 | 67,168,341 | 17,256,368 | 84,424,709 | 79.6 |
| 1957 | 66,982,200 | 17,388,825 | 84,371,025 | 79.4 |
| 1956 | 67,087,082 | 17,921,154 | 85,008,156 | 78.9 |
| 1955 | 66,179,819 | 18,798,255 | 84,977,274 | 77.9 |
| 1954 | 63,927,835 | 19,277,986 | 83,205,021 | 76.7 |
| 1953 | 65,830,585 | 20,214,611 | 86,045,116 | 76.5 |
| 1952 | 63,259,469 | 21,477,011 | 84,836,480 | 74.7 |
| 1951 | 61,706,743 | 22,116,893 | 83,823,636 | 73.6 |
| 1950 | 59,487,521 | 23,342,616 | 82,830,137 | 71.8 |
| 1949 | 59,443,805 | 25,113,882 | 84,557,687 | 70.3 |
| 1948 | 58,499,355 | 26,367,959 | 85,867,314 | 69.0 |
| 1947 | 58,899,647 | 28,272,887 | 87,172,234 | 67.6 |
| 1946 | 53,010,253 | 26,530,343 | 79,540,696 | 66.6 |
| 1945 | 52,664,148 | 27,177,347 | 81,841,395 | 64.3 |
| 1944 | 49,543,252 | 29,970,952 | 79,514,204 | 62.3 |
| 1943 | 44,348,184 | 28,444,754 | 72,692,938 | 60.9 |
| 1942 | 37,917,179 | 26,666,939 | 64,584,118 | 58.7 |
| 1941 | 32,199,818 | 25,204,362 | 57,403,272 | 56.1 |
| 1940 | 26,761,946 | 25,069,151 | 51,811,697 | 51.7 |
| 1939 | 26,043,002 | 26,744,631 | 52,787,633 | 49.3 |
| 1938 | 23,734,562 | 27,442,571 | 51,403,133 | 46.2 |
| 1937 | 24,431,399 | 31,300,794 | 55,732,193 | 43.8 |
| 1936 | 20,218,406 | 32,791,610 | 53,010,016 | 38.1 |
| 1935 | 13,311,837 | 31,831,195 | 45,143,032 | 29.5 |
| 1934 | 10,822,344 | 30,012,543 | 40,834,987 | 25.8 |
| 1933** | 6,467,480 | 14,002,361 | 20,469,641 | 31.6 |

* Unaudited
**For nine months only

## MASSACHUSETTS BARREL SALES

### 1964 – 1960

### (IN TERMS OF THOUSANDS)

| BRANDS | 1964 | 1963 | 1962 | 1961 | 1960 |
|---|---|---|---|---|---|
| Ruppert | 532 | 517 | 500 | 494 | 496 |
| *Narragansett | 488 | 460 | 418 | 393 | 318 |
| Budweiser | 345 | 299 | 287 | 262 | 244 |
| Carling | 252 | 288 | 297 | 278 | 249 |
| Schaefer | 248 | 233 | 208 | 195 | 178 |
| Schlitz | 174 | 169 | 147 | 138 | 129 |
| Ballantine | 163 | 186 | 170 | 192 | 208 |
| Pabst | 120 | 65 | 52 | 54 | 50 |
| Miller | 89 | 75 | 71 | 64 | 52 |
| Rheingold | 83 | 81 | 61 | 60 | 60 |
| Others | 407 | 432 | 494 | 550 | 642 |
| TOTAL BARRELS | 2901 | 2805 | 2705 | 2680 | 2626 |

* Excludes Haffenreffer Products.

## MASSACHUSETTS

### 1964 – 1960

### SHARE OF MARKET

| BRANDS | 1964 | 1963 | 1962 | 1961 | 1960 |
|---|---|---|---|---|---|
| Ruppert | 18% | 18% | 19% | 18% | 19% |
| *Narragansett | 17 | 16 | 15 | 15 | 12 |
| Budweiser | 12 | 11 | 11 | 10 | 9 |
| Carling | 9 | 10 | 11 | 10 | 10 |
| Schaefer | 9 | 8 | 8 | 7 | 7 |
| Schlitz | 6 | 6 | 5 | 5 | 5 |
| Ballantine | 6 | 7 | 6 | 7 | 8 |
| Pabst | 4 | 2 | 2 | 2 | 2 |
| Miller | 3 | 3 | 3 | 2 | 2 |
| Rheingold | 3 | 3 | 2 | 2 | 2 |
| Others | 13 | 16 | 18 | 22 | 24 |
| TOTAL BARRELS | 100% | 100% | 100% | 100% | 100% |

* Excludes Haffenreffer Products.

## CONNECTICUT BARREL SALES

### 1964 – 1960

### (IN TERMS OF THOUSANDS)

| BRANDS | 1964 | 1963 | 1962 | 1961 | 1960 |
|---|---|---|---|---|---|
| Schaefer | 276 | 253 | 233 | 221 | 211 |
| Rheingold | 173 | 176 | 168 | 166 | 161 |
| Ballantine | 153 | 159 | 167 | 188 | 190 |
| Ruppert | 118 | 112 | 107 | 127 | 140 |
| *Narragansett | 75 | 75 | 62 | 64 | 62 |
| Others (inc. Premium) | 594 | 562 | 544 | 518 | 514 |
| TOTAL BARRELS | 1,389 | 1,337 | 1,281 | 1,284 | 1,278 |

*Excludes Haffenreffer Products.

## CONNECTICUT

### 1964 – 1960

### SHARE OF MARKET

| BRANDS | 1964 | 1963 | 1962 | 1961 | 1960 |
|---|---|---|---|---|---|
| Schaefer | 20% | 19% | 18% | 17% | 17% |
| Rheingold | 12 | 13 | 13 | 13 | 13 |
| Ballantine | 11 | 12 | 13 | 15 | 15 |
| Ruppert | 9 | 8 | 8 | 10 | 11 |
| *Narragansett | 5 | 6 | 5 | 5 | 5 |
| Others | 43 | 42 | 43 | 40 | 39 |
| TOTAL BARRELS | 100% | 100% | 100% | 100% | 100% |

*Excludes Haffenreffer Products.

## MAINE BARREL SALES

### 1964 – 1960

### (IN TERMS OF THOUSANDS)

| BRANDS | 1964 | 1963 | 1962 | 1961 | 1960 |
|---|---|---|---|---|---|
| *Narragansett | 126 | 124 | 114 | 117 | 90 |
| Budweiser | 74 | 64 | 65 | 65 | 65 |
| Schlitz | 56 | 57 | 48 | 45 | 46 |
| Carling | 52 | 59 | 54 | 51 | 48 |
| Ruppert | 40 | 40 | 36 | 37 | 41 |
| Ballantine | 22 | 24 | 28 | 33 | 40 |
| Miller | 7 | 5 | 5 | 6 | 7 |
| Schaefer | 6 | 6 | 6 | 8 | 10 |
| Others | 101 | 90 | 89 | 99 | 120 |
| TOTAL BARRELS | 484 | 469 | 445 | 461 | 467 |

* Excludes Haffenreffer Products.

## MAINE

### 1964 – 1960

### SHARE OF MARKET

| BRANDS | 1964 | 1963 | 1962 | 1961 | 1960 |
|---|---|---|---|---|---|
| *Narragansett | 26% | 26% | 26% | 25% | 19% |
| Budweiser | 15 | 14 | 15 | 14 | 14 |
| Schlitz | 12 | 12 | 11 | 10 | 10 |
| Carling | 11 | 13 | 12 | 11 | 10 |
| Ruppert | 8 | 9 | 8 | 8 | 9 |
| Ballantine | 5 | 5 | 6 | 7 | 9 |
| Miller | 1 | 1 | 1 | 1 | 1 |
| Schaefer | 1 | 1 | 1 | 2 | 2 |
| Others | 21 | 19 | 20 | 22 | 26 |
| TOTAL BARRELS | 100% | 100% | 100% | 100% | 100% |

* Excludes Haffenreffer Products.

## RHODE ISLAND BARREL SALES

### 1964 – 1960

### (IN TERMS OF THOUSANDS)

| BRANDS | 1969 | 1963 | 1962 | 1961 | 1960 |
|---|---|---|---|---|---|
| *Narragansett | 379 | 376 | 372 | 374 | 372 |
| Budweiser | 39 | 34 | 32 | 30 | 29 |
| Ruppert | 39 | 38 | 36 | 38 | 38 |
| Ballantine | 33 | 33 | 33 | 34 | 34 |
| Schlitz | 20 | 20 | 16 | 17 | 17 |
| Carling | 20 | 20 | 18 | 16 | 14 |
| Schaefer | 10 | 8 | 8 | 8 | 8 |
| Miller | 8 | 7 | 6 | 6 | 6 |
| Others | 39 | 40 | 39 | 41 | 43 |
| TOTAL BARRELS | 587 | 576 | 560 | 564 | 561 |

* Excludes Haffenreffer Products.

## RHODE ISLAND

### 1964 – 1960

### SHARE OF MARKET

| BRANDS | 1964 | 1963 | 1962 | 1961 | 1960 |
|---|---|---|---|---|---|
| *Narragansett | 65% | 65% | 66% | 66% | 66% |
| Budweiser | 7 | 6 | 6 | 5 | 5 |
| Ruppert | 7 | 7 | 7 | 7 | 7 |
| Ballantine | 6 | 6 | 6 | 6 | 6 |
| Schlitz | 3 | 4 | 3 | 3 | 3 |
| Carling | 3 | 4 | 3 | 3 | 3 |
| Schaefer | 2 | 2 | 1 | 2 | 2 |
| Miller | 1 | 1 | 1 | 1 | 1 |
| Others | 6 | 5 | 7 | 7 | 7 |
| TOTAL BARRELS | 100% | 100% | 100% | 100% | 100% |

* Excludes Haffenreffer Products.

## NEW HAMPSHIRE BARREL SALES

### 1964 – 1960

### (IN TERMS OF THOUSANDS)

| BRANDS | 1964 | 1963 | 1962 | 1961 | 1960 |
|---|---|---|---|---|---|
| *Narragansett | 79 | 77 | 68 | 58 | 40 |
| Budweiser | 64 | 50 | 17 | 42 | 37 |
| Ruppert | 64 | 67 | 63 | 62 | 65 |
| Rheingold | 36 | 34 | 31 | 32 | 27 |
| Carling | 34 | 42 | 39 | 39 | 38 |
| Schlitz | 34 | 32 | 25 | 24 | 23 |
| Ballantine | 30 | 34 | 38 | 44 | 47 |
| Schaefer | 29 | 28 | 23 | 20 | 19 |
| Miller | 12 | 9 | 9 | 9 | 6 |
| Others | 58 | 38 | 37 | 41 | 54 |
| TOTAL BARRELS | 440 | 411 | 380 | 372 | 356 |

* Excludes Haffenreffer Products.

## NEW HAMPSHIRE

### 1964 – 1960

### SHARE OF MARKET

| BRANDS | 1964 | 1963 | 1962 | 1961 | 1960 |
|---|---|---|---|---|---|
| *Narragansett | 18% | 19% | 18% | 16% | 11% |
| Budweiser | 15 | 12 | 12 | 11 | 11 |
| Ruppert | 15 | 16 | 17 | 17 | 18 |
| Rheingold | 8 | 8 | 8 | 9 | 8 |
| Carling | 8 | 10 | 10 | 11 | 11 |
| Schlitz | 8 | 8 | 7 | 6 | 6 |
| Ballantine | 7 | 8 | 10 | 12 | 13 |
| Schaefer | 7 | 7 | 6 | 5 | 5 |
| Miller | 3 | 2 | 2 | 2 | 2 |
| Others | 11 | 10 | 10 | 11 | 15 |
| TOTAL BARRELS | 100% | 100% | 100% | 100% | 100% |

* Excludes Haffenreffer Products.

## VERMONT BARREL SALES

### 1964 – 1960

### (IN TERMS OF THOUSANDS)

| BRANDS | 1964 | 1963 | 1962 | 1961 | 1960 |
|---|---|---|---|---|---|
| Schaefer | 35 | 31 | 31 | 29 | 29 |
| Carling | 33 | 41 | 41 | 39 | 39 |
| Budweiser | 32 | 25 | 25 | 23 | 23 |
| Rheingold | 23 | 24 | 18 | 17 | 7 |
| *Narragansett | 22 | 21 | 21 | 21 | 13 |
| Ruppert | 15 | 17 | 18 | 19 | 23 |
| Ballantine | 15 | 15 | 15 | 14 | 17 |
| Schlitz | 11 | 10 | 9 | 9 | 9 |
| Miller | 5 | 3 | 3 | 3 | 3 |
| Others | 30 | 23 | 18 | 15 | 28 |
| TOTAL BARRELS | 221 | 210 | 199 | 189 | 191 |

* Excludes Haffenreffer Products.

## VERMONT

### 1964 – 1960

### SHARE OF MARKET

| BRANDS | 1964 | 1963 | 1962 | 1961 | 1960 |
|---|---|---|---|---|---|
| Schaefer | 16% | 15% | 15% | 16% | 15% |
| Carling | 15 | 20 | 21 | 21 | 21 |
| Budweiser | 14 | 12 | 13 | 12 | 12 |
| Rheingold | 11 | 11 | 9 | 9 | 4 |
| *Narragansett | 10 | 10 | 11 | 11 | 7 |
| Ruppert | 7 | 8 | 9 | 10 | 12 |
| Ballantine | 7 | 7 | 7 | 7 | 9 |
| Schlitz | 5 | 5 | 4 | 5 | 5 |
| Miller | 2 | 2 | 2 | 2 | 2 |
| Others | 13 | 10 | 9 | 7 | 13 |
| TOTAL BARRELS | 100% | 100% | 100% | 100% | 100% |

* Excludes Haffenreffer Products.

GX-2

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

| | |
|---|---|
| UNITED STATES OF AMERICA, PLAINTIFF<br>*v.*<br>FALSTAFF BREWING CORPORATION, DEFENDANT | Civil Action No. 3523 |

**INTERROGATORIES TO BE ANSWERED BY THE DEFENDANT FALSTAFF BREWING CORPORATION**

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, plaintiff requests that defendant FALSTAFF BREWING CORPORATION (hereinafter referred to as "Falstaff") answer fully under oath by its duly authorized officers or agents having knowledge of the facts the interrogatories herein set forth.

1. Name each brewing company acquired by Falstaff since 1933, excluding the Narragansett Brewing Company, and as to each state:

   a) the date of the acquisition, the consideration paid and the geographical location of the acquired facilities.
   b) the capacity, in barrels, of the acquired facilities at the time of the acquisition.
   c) the geographical area in which the beer of the acquired brewery was sold at the time of the acquisition.
   d) whether the acquired facilities were remodeled by Falstaff so as to increase its capacity and, if so, the date or dates thereof, the amount in barrels of the increased capacity and the cost thereof.
   e) the geographical area which was served from such acquired facilities, whether so remodeled or not, as of January, 1965.
   f) the amount of beer produced at such acquired facilities, whether so remodeled or not, during the year 1964, and the capacity of such facilities.

2. List by geographical location the brewing plants built by Falstaff, the cost of each and its capacity in barrels.
3. List the states in which Falstaff sold its beer as of January for each year from 1950 to 1965, and designate for each such time which brewery serviced which states.
4. As to each brewery owned by Falstaff state, in terms of barrels, its capacity as of January, 1965.
5. List the malting facilities acquired by Falstaff since 1933 and as to each state:
   a) the date of the acquisition, from whom, the consideration paid and the geographical location of the acquired facilities.
   b) the capacity of such facilities at the time of acquisition.
   c) the productive capacity of such acquired facilities at the time of the acquisition.
   d) whether the acquired facilities were remodeled by Falstaff so as to increase its capacity and, if so, the date or dates thereof, the amount of the increased capacity and the cost thereof.
   e) the capacity of such acquired facilities as of January, 1965.
6. List by geographical location the malting facilities owned by Falstaff as of January, 1965, and state the capacity of each.
7. State the brewing plants and their locations which receive malt from each such malting facility.
8. List and generally describe all other facilities involving real estate (aside from malting plants, breweries and office space of office buildings) which were acquired by Falstaff since 1950 for use in its business and as to each state the date of the acquisition, from whom it was acquired, and its cost.
9. List and identify the brewing companies which Falstaff unsuccessfully attempted to acquire since 1950.
10. List and identify the brewing companies which sought to sell or indicated an interest in selling its facilities to Falstaff since 1950, not including those which actually sold its facilities to Falstaff.
11. State as to each of the following states—Rhode Is-

land, Connecticut, Massachusetts, Vermont, New Hampshire, Maine, New Jersey, and New York—the number of distributors of Narragansett Brewing Company products in each such state as of January, 1965.

Dated: Boston, Massachusetts
November , 1965

/s/ John J. Galgay

/s/ William J. Elkins

/s/ John D. Swartz

/s/ Philip F. Cody

Attorneys, Department of Justice

Attorneys, Department of Justice

To: Matthew Goring, Esquire
2200 Industrial Bank Building
Providence, Rhode Island

George M. Vetter, Esquire
2200 Industrial Bank Building
Providence, Rhode Island

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

| | |
|---|---|
| UNITED STATES OF AMERICA, PLAINTIFF<br>*v.*<br>FALSTAFF BREWING CORPORATION, DEFENDANT | Civil Action No. 3523 |

**CERTIFICATE OF SERVICE**

I hereby certify that on November , 1965, I served copies of the attached interrogatories upon Matthew Goring and George M. Vetter, 220 Industrial Bank Building, Providence, Rhode Island, attorneys for defendant Falstaff Brewing Corporation, by depositing copies thereof in the United States mail, postage prepaid, in envelopes addressed respectively to each of said attorneys at their said addresses.

*(s) William J. Elkins*
WILLIAM J. ELKINS
*Attorney for Plaintiff*

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA,
*Plaintiff.*

*v.*

FALSTAFF BREWING CORPORATION,
*Defendant.*

Civil Action No. 3523

**ANSWERS OF DEFENDANT FALSTAFF BREWING CORPORATION TO INTERROGATORIES OF THE PLAINTIFF**

TO:

John J. Galgay,
John D. Swartz,
William J. Elkins,
Philip F. Cody, Attorneys
Department of Justice.

The following are the answers of the defendant, Falstaff Brewing Corporation, to the interrogatories numbered 1 to 11, directed to the defendant, to be answered pursuant to Rule 33:

1. (a) through (f)—The information called for by the first interrogatory regarding acquisitions of Falstaff Brewing Corporation was given in detail to the United States Department of Justice in connection with most of such acquisitions and is in possession of the plaintiff.

The present Falstaff Brewing Corporation, as a business entity, was formed immediately prior to the advent of national prohibition in 1920. During the ensuing 12 years, business activities consisted of the production of soft drinks and hams and bacons at a plant on Forest Park Boulevard, formerly used as a brewery. It was not until 1933, when prohibition was repealed, that Falstaff entered the brewing business with its product, Falstaff beer. Its plant had a capacity of about 100,000 barrels per year. In 1934 an idle brewery in St. Louis, formerly operated by Otto Stifel Union Brewing Company, was leased and used to produce Falstaff beer. This brewery had an annual capacity of about 250,000 barrels. It was purchased for

$600,000 in 1944. The capacity of this plant was not substantially increased from the time it was leased until its operation was discontinued in 1952. The principal market for these two breweries was comprised of Missouri, southern Illinois and Arkansas though some sales were made in the territory beyond this natural market area.

In 1935 Falstaff acquired the Krug Brewery in Omaha, Nebraska, pursuant to a plan of reorganization approved by the United States District Court in proceedings under then Section 77B of the Bankruptcy Act. The cost was approximately $430,000. This facility was used to produce Falstaff beer, which was sold principally in the surrounding market area, consisting of Nebraska, Colorado, Kansas and Iowa. At the time of the acquisition, the Omaha brewing facility had an annual capacity of about 150,000 barrels. In 1941, capacity of this plant was increased by approximately 350,000 barrels through the expenditure of about $1,000,000 in remodeling. In 1947, through an additional expenditure of $275,000, it was increased by an additional 50,000 barrels. In 1953, through an expenditure of $1,000,000, it was increased by another 150,000 barrels. The geographical area served by this brewery has not changed substantially since its acquisition, except for inclusion of Oklahoma. This facility produced 689,649 barrels of Falstaff beer in 1964. Its capacity is approximately 700,000 barrels.

In 1937, Falstaff acquired the brewery of National Brewing Company, New Orleans, Louisiana, at a cost of $366,800. It had an annual capacity of about 140,000 barrels. Over the years remodeling has been undertaken to increase capacity. The years in which such remodeling was undertaken, the approximate cost thereof, and the approximate increase in capacity are shown below:

| *Date* | *Increase in Annual Capacity* | *Cost of Remodeling* |
|---|---|---|
| 1937 | 10,000 barrels | $ 200,000.00 |
| 1946 | 198,000 " | 750,000.00 |
| 1947 | 402,000 " | 2,225,000.00 |
| 1953 | 350,000 " | 3,800,000.00 |

During the period immediately following acquisition this brewing facility was used to supply Falstaff beer in Louisi-

ana, eastern Texas, and Mississippi. This market has been expanded to include Arkansas, Alabama, Florida, Kentucky, and part of Tennessee. In conjunction with the plant at Fort Wayne, Indiana, the New Orleans facility supplies Falstaff beer to markets in Georgia and South Carolina. During 1964, the New Orleans plant produced 1,007,967 barrels of Falstaff beer. Its capacity was 1,100,000 barrels.

In 1948, Falstaff acquired by merger (involving the issuance of preferred stock having an aggregate par value of $2,752,695) the brewery of Columbia Brewing Company in St. Louis. Its annual capacity was approximately 500,000 barrels. In 1950 this capacity was increased by 75,000 barrels at an approximate cost of $500,000. Further remodeling was undertaken in 1958 to increase capacity by an additional 25,000 barrels at a cost of approximately $100,000. In 1964 this brewery produced 465,915 barrels of Falstaff beer. Its capacity was 600,000. The principal market area for this plant is Missouri, northern Arkansas and Illinois.

In 1952, Falstaff acquired the brewery of Pacific Brewing & Malting Co., San Jose, California at an approximate cost of $2,673,000. Its capacity was 200,000 barrels per year. Pursuant to remodeling done in 1955 at a cost of approximately $500,000, the annual capacity was increased by 150,000 barrels; in 1956, at a cost of approximately $50,000, the capacity was increased by 50,000 barrels; in 1957, at a cost of $400,000, the capacity was increased 100,000 barrels. Immediately after acquisition, this facility was used to supply Falstaff beer principally to the northern California market. This market has been expanded to include Southern California and part of Nevada. Shipments are also made to Hawaii and the far East. In 1964, this brewery produced 412,890 barrels. Its capacity was 500,000 barrels.

In 1954, Falstaff leased the brewing facilities of Berghoff Brewing Company at Fort Wayne, Indiana. The lease contained an option to purchase, which was exercised in 1964 at a cost of $735,464. This facility had an original annual capacity of 400,000 barrels. In 1955 and 1956, remodeling was undertaken at a cost of $650,000, which increased capacity 400,000 barrels. In 1961, at a remodeling cost of $450,000, capacity was increased by an additional 200,000 barrels. In 1964, 966,380 barrels of Falstaff beer were produced at this facility. Its capacity was 1,000,000 barrels. The Falstaff market initially served by this facility con-

sisted of Indiana and parts of Illinois, Michigan and Ohio. Subsequently, the brewery served, in part, the southeastern States of Georgia, North and South Carolina, Maryland, Virginia, West Virginia, Florida, and Washington D.C.

In 1956, Falstaff acquired the brewing facilities of Galveston-Houston Breweries, Inc. at Galveston, Texas for $1,271,771. The capacity of this brewery was 400,000 barrels. In 1958, remodeling was undertaken at a cost of $3,330,000, which increased the annual capacity 200,000 barrels. In 1961, additional remodeling was undertaken at a cost of $7,000,000, resulting in an increased capacity of 600,000 barrels. The principal market served by this facility is Texas. Initially, following acquisition, it served only that part of the Texas market in the general vicinity of Galveston and Houston. In 1964, 1,190,927 barrels of Falstaff beer were produced. The brewery's capacity is 1,200,000.

In 1956, Falstaff acquired the brewery of Mitchell Brewing Company at El Paso, Texas for $1,500,000. Its capacity was 120,000 barrels annually. Through remodeling undertaken in 1956 at a cost of $250,000 the capacity was increased by 105,000 barrels. In 1964, this facility produced 198,851 barrels of Falstaff beer. Its capacity was 225,000. The market served by this brewery is principally western Texas, Arizona and New Mexico. This is substantially the same market supplied at the time of acquisition.

In 1957, Falstaff acquired by merger (resulting in the issuance of $3,160,000 par value of preferred stock) the brewery of Griesedieck Bros. Brewing Company in St. Louis, Mo. Its capacity was 900,000 barrels. In 1962, $900,000 was spent in remodeling this facility, resulting in a capacity increase of 200,000 barrels. Falstaff beer produced in 1964 at this plant amounted to 1,040,149 barrels. The capacity of the brewery is 1,100,000. The Falstaff market served by this facility following acquisition was the same market served by the other St. Louis plants of Falstaff and this has remained substantially unchanged. Shortly following this acquisition, Falstaff's original plant on Forest Park Boulevard in St. Louis was dismantled and the real estate sold.

The information set forth above is approximate. It is impossible to give precise delineation of those marketing areas into which Falstaff beer produced at each plant is

shipped because this is constantly changing to some degree and because more than one of the breweries supply the same states or parts thereof. Further difficulty is encountered in defining markets precisely, because of the necessity, in periods of peak demand, to make cross shipments to even out supply. Generally speaking, however, the geographical boundaries given comprise the principal market for each plant.

2. Falstaff has built no breweries.

3. Following are the various States in which Falstaff sold Falstaff beer as of January for each year from 1950 to 1965. The plant or plants which were the principal suppliers of such States are shown:

*ALABAMA*
Served entire period.
Principal supplier—New Orleans

*ALASKA*
Entered market in 1965.
Principal supplier—San Jose

*ARIZONA*
Entered market in 1956.
Principal supplier—El Paso

*ARKANSAS*
Served entire period
Principal supplier—St. Louis

*CALIFORNIA*
Entered market 1952
Principal supplier—San Jose

*COLORADO*
Served entire period
Principal supplier—Omaha

*DIST. OF COLUMBIA*
Entered market in 1962
Principal supplier—Ft. Wayne

*FLORIDA*
Served entire period
Principal supplier—New Orleans

*GEORGIA*
Served since 1953
Principal supplier—New Orleans, subsequently Ft. Wayne following acquisition and remodeling.

*HAWAII*
Entered market in 1954
Principal supplier—San Jose

*ILLINOIS*
Served entire period
Principal supplier—St. Louis

*INDIANA*
Some sales made in Indiana in 1953, but market opened in 1954.
Principal supplier—Ft. Wayne

*IOWA*
Served entire period
Principal supplier—Omaha

*KANSAS*
Entered market in 1953
Principal supplier—Omaha

*KENTUCKY*
Served entire period
Principal supplier—St. Louis

*LOUISIANA*
Served entire period
Principal supplier—New Orleans

*MARYLAND*
Entered market in 1965
Principal supplier—Ft. Wayne

*MICHIGAN*
Entered market in 1954
Principal supplier—Ft. Wayne

*MISSISSIPPI*
Served entire period
Principal supplier—New Orleans

*MISSOURI*
Served entire period
Principal supplier—St. Louis

*NEBRASKA*
Served entire period
Principal supplier—Omaha

*NEVADA*
Entered market in 1954
Principal supplier—San Jose

*NEW MEXICO*
Entered small portion of market in 1954, but more extensively in 1956 upon acquisition of El Paso plant.
Principal supplier—El Paso

*NORTH CAROLINA*
Entered market in 1961
Principal supplier—Ft. Wayne

*OHIO*
Entered market in 1954
Principal supplier—Ft. Wayne

*OKLAHOMA*
Served entire period
Principal supplier—Omaha

*SO. CAROLINA*
Entered market in 1960
Principal supplier—Ft. Wayne

*SO. DAKOTA*
Served entire period in very small way
Principal supplier—Omaha

*TENNESSEE*
Served entire period
Principal supplier—St. Louis

*TEXAS*
Served entire period
Principal supplier—Galveston

*VIRGINIA*
Entered market in 1963
Principal supplier—Ft. Wayne

*WEST VIRGINIA*
Entered market in 1963
Principal supplier—Ft. Wayne

*WYOMING*

Served entire period in very small way
Principal supplier—Omaha.

4. Following are the annual capacities, stated in barrels, of the breweries owned by Falstaff as of January, 1965:

| | |
|---|---|
| Omaha (Plant 3) | 700,000 |
| New Orleans (Plant 4) | 1,100,000 |
| San Jose (Plant 6) | 500,000 |
| Fort Wayne (Plant 7) | 1,000,000 |
| Galveston (Plant 8) | 1,200,000 |
| El Paso (Plant 9) | 225,000 |
| St. Louis (Plant 5) | 600,000 |
| St. Louis (Plant 10) | 1,100,000 |

5. (a) to (e)—Only one malting facility has ever been acquired by Falstaff and that is the facility in Chicago, Illinois, formerly owned by Schwill Malting Company. It was acquired in 1961 in connection with the liquidation of the Schwill Malting Company for $2,348,212. The capacity of this facility at the time of acquisition was 4,800,000 bushels, subsequently increased to 5,200,000 bushels. This increase in capacity was the result not of remodeling but of increases achieved through streamling of production. The annual capacity of this facility at January, 1965 was (and now is) 5,200,000 bushels. In 1961, Falstaff acquired, for the purpose of grain storage, a facility in Chicago, Illinois, immediately adjacent to the Schwill Malting Company, formerly used by Columbia Malting Company for malting purposes. Its use for malting purposes had been terminated by Columbia prior to the time that it was acquired by Falstaff for storage purposes.

6. Falstaff owns only the malting facility mentioned above.

7. All of the brewing plants of Falstaff are supplied with malt from the above facility. At the time of the negotiations between Falstaff and Narragansett for the acquisition by Falstaff of the latter's brewery in Cranston, Rhode Island, it was not the intention of Falstaff to supply malt to the Narragansett plant from Falstaff's Chicago facility, because it was anticipated that the full output of this facility would be required to meet production demands in Falstaff's other plants. However, a sharp drop in Falstaff's

anticipated sales of beer, have compelled revision of production schedules and made malt available for the Narragansett brewery.

8. There have been no such acquisitions, except the purchase of about 40 acres of ground in Anaheim, California, acquired by Falstaff in 1959 from Aguirre, Riley, Tolman, Herbert, Crenshaw Building Corporation and Crenshaw Leasing Corporation, at a cost of about $650,000, for possible use in the construction of a brewery to supply Falstaff beer to the southern California market. Construction of this brewery has been abandoned as economically unfeasible.

9. Falstaff conducted negotiations with the following brewing companies with regard to acquisition or merger since 1950 (not including those mentioned above):

Miller Brewing Company
Liebman Breweries, Inc.
P. Ballantine and Sons

Discussions were had from time to time with other brewers, but none of these discussions approached the point of actual negotiations in which Falstaff sought to acquire them or their facilities.

10. Following are brewing companies which sought to sell or indicated a serious interest in selling their facilities to Falstaff since 1950, not including those brewing companies mentioned above:

Drewrys, Ltd. (Piel Bros.)
Stegmaier Brewing Co.
Goebel Brewing Company
Glueck Brewing Company.

Over the past fifteen years a number of inquiries have been received from or on behalf of small brewers to determine whether Falstaff had an interest in acquiring them or their assets. Falstaff had no interest. It is not believed that these inquiries could, of themselves, be considered to manifest a serious interest in selling their facilities to Falstaff.

11. As of January, 1965, Narragansett Brewing Company had, in the States listed below, the number of distributors shown:

| *NAME* | *NUMBER OF DISTRIBUTORS* |
|---|---|
| Rhode Island | 16 |
| Connecticut | 9 |
| Massachusetts | 15 |
| Vermont | 6 |
| New Hampshire | 6 |
| Maine | 16 |
| New Jersey | 8 |
| New York | 18 |

Dated: St. Louis, Missouri
December 27, 1965

FALLSTAFF BREWING CORPORATION

By /s/ J. H. Wemhoener
Vice-President

STATE OF MISSOURI:
CITY OF ST. LOUIS: ss.

J. H. Wemhoener, being first duly sworn, states that he is Vice-President of defendant, Falstaff Brewing Corporation and authorized by said corporation to make this verification on its behalf; that as such Vice-President of said corporation, affiant has read the foregoing answers to Plaintiff's interrogatories and states that they are true.

J. H. Wemhoener

Subscribed and sworn to before me this 27th day of December, 1965.

My commission expires March 18, 1968.

Mary J. McNamara
Notary Public

Matthew W. Goring
Hinckley, Allen, Salisbury & Parsons
2200 Industrial Bank Building,
Providence, Rhode Island

Warren F. Farr,
Ropes & Gray
50 Federal Street
Boston, Massachusetts
Of Counsel

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

| | |
|---|---|
| UNITED STATES OF AMERICA, PLAINTIFF, v. FALSTAFF BREWING CORPORATION, DEFENDANT | Civil Action No. 3523 |

**CERTIFICATE**

I, Matthew W. Goring, attorney for the defendant herein, hereby certify that I have this day served the foregoing answers to interrogatories of the plaintiff by delivering a copy thereof to the office of Raymond J. Pettine, Esq., United States District Attorney for the District of Rhode Island, U. S. Post Office and Court House Building, Providence, Rhode Island, and by mailing three copies thereof, postage prepaid, to W. J. Elkins, Esq., Department of Justice, Antitrust Division, Room 1706, Post Office Building, Boston, Massachusetts, of counsel of record for the plaintiff.

*MATTHEW W. GORING*
MATTHEW W. GORING

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

| | |
|---|---|
| UNITED STATES OF AMERICA, PLAINTIFF, v. FALSTAFF BREWING CORPORATION, DEFENDANT | Civil Action No. 3523 |

**SUPPLEMENTAL ANSWERS OF DEFENDENT, FALSTAFF BREWING CORPORATION, TO INTERROGATORIES OF PLAINTIFF.**

To: John J. Galgay
John D. Swartz
William J. Elkins
Philip F. Cody, Attorneys
Department of Justice

Plaintiff has requested additional information to supplement the answers given to interrogatories 9 and 10. The interrogatories propounded and the answers given are as follows:

9. *Interrogatory:* List and identify the brewing companies which Falstaff unsuccessfully attempted to acquire since 1950.

*Answer:* Falstaff conducted negotiations with the following brewing companies with regard to acquisition or merger since 1950 (not including those mentioned above):

Miller Brewing Company
Liebman Brewers, Inc.
P. Ballantine and Sons

Discussions were had from time to time with other brewers, but none of these discussions approached the point of actual negotiations in which Falstaff sought to acquire them or their facilities.

10. *Interrogatory:* List and identify the brewing companies which sought to sell or indicated an interest in selling its facilities to Falstaff since 1950, not

including those which actually sold its facilities to Falstaff.

10. *Answer:* Following are brewing companies which sought to sell or indicated a serious interest in selling their facilities to Falstaff since 1950, not including those brewing companies mentioned above:

Drewrys, Ltd. (Piel Bros.)
Stegmaier Brewing Company
Goebel Brewing Company
Glueck Brewing Company

Over the past fifteen years a number of inquiries have been received from or on behalf of small brewers to determine whether Falstaff had an interest in acquiring them or their assets. Falstaff had no interest. It is not believed that these inquiries could, of themselves, be considered to manifest a serious interest in selling their facilities to Falstaff.

The answers given to interrogatories 9 and 10 were responsive and complete. Plaintiff, however, requests to know the names of other brewers with whom discussions were had or from whom, or in connection with whom, inquiries were received. The following supplemental information is given in response to such request:

9. In addition to the three brewers named, general, exploratory discussions on the desirability of merger or acquisition were had with the following named brewers, but did not involve an attempt, successful or unsuccessful, on the part of Falstaff to acquire such brewing companies or an attempt upon the part of such brewing companies to sell to Falstaff:

Genesee Brewing Co., Rochester, N. Y.
International Breweries, Inc., Detroit, Michigan
Heilman's Brewing Co., LaCrosse, Wisconsin
Maier Brewing Co., Los Angeles, California
Minneapolis Brewing Co., Minneapolis, Minnesota
National Brewing Company, Baltimore, Maryland

10. In addition to the brewers named in response to this

interrogatory, Falstaff received inquiries with relation to the following brewers:

(1) Arizona Brewing Co., Phoenix, Arizona, inquiry received in 1959 from Frank J. McGrath Corporation, New York, as to whether Falstaff would be interested in acquiring this company or its assets. It is not known whether McGrath represented Arizona or whether the latter company was interested in selling. Subsequent inquiry received in 1962 from Lehman Bros., New York, indicating representation of an Arizona stockholder and inquiring as to Falstaff's interest in this brewery. Falstaff advised that it had no interest.

(2) Pfeiffer Brewing Company, Detroit, Michigan. Inquiry received from person purporting to be a Pfeiffer stockholder, seeking to interest Falstaff in acquiring this brewery or its assets. Whether it was for sale or not is not known. Advised that Falstaff had no interest.

(3) Associated Brewing Company, Detroit, Michigan. Inquiry from person purporting to be stockholder and from another person whose interest is not disclosed. Advised that Falstaff had no interest.

(4) Atlantic Brewing Company, Chicago, Illinois. Inquiry received in 1960 from Harold Lederer, connected with that company, as to whether Falstaff might have an interest in an exchange of stock or possibly using that company as a distributor in Chicago area. No interest shown.

(5) Cremo Brewing Co., Darien, Connecticut. Inquiry received in 1954 from State of Connecticut Development Commission as to Fallstaff's interest in acquiring this brewery, which is stated to "have come on the market". Falstaff advised that it had no interest.

(6) Buckeye Brewing Company, Toledo, Ohio.

Inquiry received in 1961 from Tyson Realty Co., Washington, D. C., inquiring as to Falstaff's interest in acquiring this company. Advised that Falstaff had no interest.

(7) Frank Fehr Brewing Co., Louisville, Kentucky. Inquiry received in 1957 from one Irvine Rommel, made, so it is stated, with permission of the Court appointed trustee of this company, as to Falstaff's interest in acquiring this company. Falstaff stated it had no interest.

(8) Fisher Brewing Co., Salt Lake City, Utah. Inquiry received in 1959 from J. A. Hogle & Co. as to Falstaff's interest in acquiring company. Advised that no interest existed.

(9) Globe Brewing Co., Baltimore, Md. Inquiry received in 1954 from one William G. Moore, authority undisclosed, to ascertain Falstaff's interest in acquiring this brewery. Advised that no interest existed.

(10) Goetz Brewing Co., St. Joseph, Mo. Inquiry received in 1959 from E. A. Mabes & Co., Kansas City, Mo., purporting to have authority, concerning Falstaff's interest in acquiring company. Advised that no interest existed.

(11) Grace Bros. Brewing Co., Los Angeles. Inquiry received in 1953 as to Falstaff's interest in acquiring company. Advised that no interest existed.

(12) Gunther Brewing Co., Baltimore, Md. Inquiry received in 1959 as to Falstaff's interest in acquiring company. No interest indicated.

(13) Peter Hand Brewery Company, Chicago, Ill. Inquiry in 1960 from Glore, Forgan & Co. suggesting exploratory conversations as to Falstaff's interest in buying and willingness of above company to sell. No interest developed and matter was dropped.

(14) Hawaiian Brewing Co., Honolulu. Inquiry received in 1960 as to Falstaff's interest in

acquiring above company. Some consideration given, but matter dropped.

(15) Fittger Brewing Co., Duluth, Minnesota. Inquiry received in 1963 from a stockholder of above company seeking to interest Falstaff in acquiring it. Advised that no interest existed.

(16) Burkhardt Brewing Co., Akron, Ohio. Inquiry received from one John A. Largay, claiming to have some authority to speak for the above company and inquiring as to Falstaff's interest in acquiring it. Advised that no interest existed.

(17) Monarch Brewing Co., Los Angeles, Cal. Inquiry in 1957 to ascertain Falstaff's interest in acquiring brewery property. Advised that no interest existed.

(18) Peoples Brewing Co., Duluth, Minn. Request received from brewing company in 1957 to come and look at company for purpose of buying it. Advised that no interest existed.

(19) Standard Brewing Company, Cleveland, Ohio. Indirect inquiry indicated this company might be interested in selling. Consideration was given to it, but the matter was dropped when it did not appear suitable.

(20) Regal Brewing Co., Miami, Florida. Regal Brewery offered by certain real estate agents pursuant to order of Court in 1960.

Dated: St. Louis, Missouri
January 28, 1966

FALSTAFF BREWING CORPORATION
By /s/ J. H. Wemhoener

Vice-President

STATE OF MISSOURI
CITY OF ST. LOUIS ss.

*J. H. WEMHOENER*, being first duly sworn, states that he is Vice-President of defendant, Falstaff Brewing Corporation and authorized by said corporation to make this verification on its behalf; that as such Vice-President of

said corporation, affiant has read the foregoing supplemental answer to plaintiff's interrogatories and states that they are true.

J. H. Wemhoener

Subscribed and sworn to before me this 28th day of January, 1966. My commission expires 3/18/68.

Notary Public

Matthew W. Goring
Hinckley, Allen, Salisbury & Parsons
2200 Industrial Bank Building
Providence, Rhode Island 02903

Warren F. Farr
Ropes & Gray
225 Franklin Street
Boston, Massachusetts, 02110

**CERTIFICATE**

I, Matthew W. Goring, attorney for the defendant herein, herby certify that I have this day served the foregoing supplemental answers of defendant to interrogatories of plaintiff by mailing a copy thereof, postage prepaid, to Raymond J. Pettine, Esq., United States District Attorney for the District of Rhode Island, U. S. Post Office and Court House Building, Providence, Rhode Island, and by mailing three copies thereof, postage prepaid, to W. J. Elkins, Esq., Department of Justice, Antitrust Division, Room 1706, Post Office Building, Boston, Massachusetts, of Counsel of record for the plaintiff.

Matthew W. Goring

GX-3B

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**ADVERTISING**

Falstaff's advertising program for 1960 was based on two objectives—holding and increasing depth of sales in those areas already established, and building sales wherever potential and opportunities warranted it. In fulfilling these objectives, television continued as the prime advertising medium for Falstaff, with the year's schedule featuring Baseball-Game-of-the-Week and professional football telecasts. Other elements of the 1960 program were effective applications of outdoor, newspaper, radio and national magazine advertising, plus a series of four quarterly promotion campaigns.

On the sports scene, Falstaff-sponsored talent held the limelight throughout 1960. For example, Harry Smith, of the company's professional bowling team, became the nation's number one bowler by winning the individual match game championship at Omaha in January. Baseball fans welcomed Dizzy Dean's new Game-of-the-Week telecast partner, Pee Wee Reese, and thousands of football fans turned out to root for the Cardinal pro football team which was moved to St. Louis from Chicago through the efforts of Falstaff management.

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GX-3C

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**"ADVERTISING . . . AN AGGRESSIVE, WELL-ROUNDED CAMPAIGN"**

Our advertising department had an "inauguration" of its own in January, 1961, when the striking new Falstaff advertising-promotional theme was introduced. "There's light-hearted living in light-hearted Falstaff" was dominant in all media. Over TV, radio, outdoor advertising, newspaper and in our point of sale the "light-hearted" theme was directed at the dominant young beer-drinking market and their way of life. To the perennial favorites—Dizzy Dean and Pee Wee Reese with the TV Baseball Game of the Week and our pro football telecasts—was added regional sponsorship of the "Sing Along with Mitch" TV show. In addition, a heavy radio spot announcement schedule was followed.

Our 16mm sound film program reached an audience of more than 22 million persons who viewed Falstaff-sponsored films of pro football, the 1961 Darlington 500 stock car races and Baseball Highlights on television and at civic, fraternal and religious organization meetings during the year. A men's bowling team captained by Billy Welu and a women's team led by Shirley Garms each captured the BPAA Match Game Championships of 1961, and both teams toured under the Falstaff banner in exhibition and tournament play throughout the year.

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GX-3D

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**"A NATIONALLY RECOGNIZED ADVERTISING CAMPAIGN"**

The highly successful "Light-Hearted Living" advertising campaign introduced in 1961, was continued through 1962. As in the past several years, the major portion of our advertising budget was spent for broadcast media—primarily television. Supplemental media support was gained through extensive use of outdoor posting and national magazine ads. A signal honor came to Falstaff's advertising in 1962 when our television commercial campaign won honors as number two in the nation in the poll conducted by "Television Today" magazine. Ballots from 783 editors and columnists named Ford Motor Company first, and Chun-King Foods third in the competition.

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GX-3E

**MARKET RESEARCH, ADVERTISING & PROMOTION PUBLIC PULSE GUIDES DYNAMIC ADVERTISING AND PROMOTION PROGRAMS**

One afternoon last fall a Paducah housewife answered a knock at the door to find a young lady standing outside. "Hello," said the caller. "I'm with the American Research Bureau, and if you have a few moments I'd like to talk with you about the beverages you bought this past week. Let me assure you . . . I'm not selling anything; I'm just conducting a survey."

The researcher went on to determine the household's buying habits, asking about purchases of coffee, tea, milk

. . . and beer. The scene was repeated more than 4,000 times in ten cities within Falstaff's marketing area, and this random sampling of the beer drinking public gave our researchers a good indication of its consumption patterns and purchasing habits.

In another test, research teams ask consumers to peer through a window into a darkened room containing a mock-up of grocery shelves bearing a number of items including Falstaff beer packages. The room lights are flashed on for a brief interval, and the viewers are then asked to recall what they've seen. Their answers can have an impact on future package and label design for our product.

Still others are called by phone and quizzed about radio commercials they may have heard in the past week, so that research personnel can gauge the effectiveness of new audio messages.

During 1963, Falstaff researchers and members of independent research organizations criss-crossed the country probing consumer attitudes in new and old sales areas. This sensitive and up-to-the-minute "feel" of buying habits is vital to the planning of our advertising and promotion functions, and it often indicates required action in advance of actual sales trends.

Through such close and continued attention to the pulse of the buying public. Falstaff's advertising and promotion dollars are channelled into the most effective selling aids.

The best elements of proven campaigns are carried forward into the program of the following year. As an example, the award-winning 1962 campaign was built around the theme, "For Lighthearted Living." Our 1963 advertising program introduced the line, "For Lighthearted Moments —This is the One," utilizing the latter phrase as an endorsement of Falstaff by likeable people in believable leisure situations or moments of relaxation. Looking forward into 1964, there's a nod toward the male beer drinker in the basic campaign theme, "For Man-Size Pleasure—This is the One."

Widest audiences are reached via television, and for this reason, the major portion of our advertising budget is spent in this media, with Falstaff a major sponsor of Baseball Game of the Week and National League Football.

Additional support is drawn from the use of outdoor advertising, national magazines and radio.

Vivid point-of-sale materials repeat the central advertising theme in taverns, supermarkets and package stores, and via the promotion department's monthly publication, The Falstaff Way, Falstaff distributors share ideas on the most effective use of promotional materials. Tie-ins with promotions of manufacturers in related fields, such as the joint display of Falstaff beer and Anchor Hocking beer glassware, were featured in 1963.

GX-3F

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The General Sales department achieved an even greater degree of sound business practice in 1964 with the development of a distributor profitability study, an account analysis program, the adoption of a Code of Cooperation between the company and distributors, and the establishment of a Distributor Advisory Council which will bring distributor and company management groups together for discussions on a regularly scheduled basis.

Such interest in developing its sales forces to the highest degree has been a positive factor in Falstaff's fulfillment of past sales goals, and lends optimism to the outlook for future gains. During the past year an alert and aggressive group of distributors strengthened our position in existing markets. Progress was also made in newly-opened sales areas such as Chicago and Washington, D.C. and in the states of Alaska and Maryland where we are conducting low key, long range sales building campaigns. The year also saw more widespread distribution among military forces served by the European Exchange System. Our total marketing area now includes 32 states and 35 overseas markets.

• • • • •

The man-size pleasure theme dominated Falstaff's national advertising in 1964. Specifically created to appeal with more directness and impact than ever to the prime market—men in the 21 to 40 age group—the theme utilized the same message and visual styling in all media . . . national magazines, newspaper inserts, billboards, radio, television and point-of-sale materials.

For basic and prestige-building coverage in homes, full-page magazine ads were scheduled in multiple audience publications, while pin-point coverage of the big-buying male market was achieved through "Man-Size" copy in such magazines as Field and Stream, Outdoor Life, Argosy and True. Outdoor advertising utilized the masculine theme as well in a strong, yet simple and dramatic fashion, and "Hi-Fi" full-color inserts for newspapers made their bow in a brilliant first for Falstaff advertising. Biggest budget dollar, as in recent years, went to television because of its wide audience coverage and its domination of the world of spectator sports.

In the far West, a novel advertising campaign was tailored specifically for the expanding California market, where the dominant beer-buying age group is growing at almost twice the speed of the national average. The innovational "Sounds of Laughter" campaign which was launched there in 1964 had just begun to produce an upswing in a relatively static sales picture when a work stoppage virtually paralyzed beer sales in the state by California-produced brands for a seven-week period. Encouraged by the response to the campaign, however, your management has approved extension of the basic selling idea into the 1965 program for this market area.

• • • • •

## A TEN-YEAR COMPARISON

| | 1956 | 1955 | 1954 | 1953 | 1952 | 1951 | 1950 | 1949 | 1948 | 1947 |
|---|---|---|---|---|---|---|---|---|---|---|
| Barrels Sold | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Net Sales | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Earnings Before Income Taxes | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Income Taxes | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Net Earnings | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Percent of Net Earnings to Net Sales | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Total Dividends | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Dividends Paid or Declared on Preferred Stock | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Amount Earned on Common Stock | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Earnings Per Share of Common Stock—Adjusted for Stock Split | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Dividends Paid or Declared per Share of Common Stock—Adjusted for Stock Split | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Net Worth | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Plant Property Less Accumulated Depreciation | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Current Assets | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Current Liabilities | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Working Capital | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Working Capital Ratio | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| Long-Term Debt | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| *Taxes | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |

*Including taxes omitted from comparison for 1954 and 1955.

GX-5

**FALSTAFF BREWING CORPORATION**
**PROXY STATEMENT**
**FOR**
**SPECIAL MEETING OF STOCKHOLDERS JULY 14, 1965**

This proxy statement is furnished in connection with the solicitation by the management of Falstaff Brewing Corporation (the "Company" or "Falstaff") of proxies for use at a Special Meeting of Stockholders to be held on July 14, 1965 at 12 o'clock, noon, Central Daylight Saving Time, at the office of the Company, 5050 Oakland Avenue, St. Louis, Missouri, and at any adjournments thereof, for the purposes set forth in the Notice of the Special Meeting. The record date for the determination of stockholders entitled to vote is June 15, 1965.

**PURPOSE OF SPECIAL MEETING**

The Special Meeting has been called to vote upon approval of a certain agreement (the "Agreement") entered into between the Company and Narragansett Brewing Company ("Narragansett"), of Cranston, Rhode Island, a Rhode Island corporation, on May 26, 1965, providing for the purchase by the Company of substantially all of the business, property and assets of Narragansett and an agreement (the "Stock Purchase Agreement") between the Company and the principal stockholders of Narragansett relating to the purchase of certain shares of the Company's Common stock to be delivered to Narragansett in part payment of the purchase price. These agreements are attached hereto as Exhibit A.

**OFFERING TO NARRAGANSETT STOCKHOLDERS**

Part of the consideration to be paid by the Company to Narragansett consists of shares of the Company's Common Stock ($1.00 par value) having an aggregate market value at the time of closing (determined as provided in the Agreement) of $2,000,000.

Narragansett will, for a period of ten days after the closing under the Agreement, offer these shares of Common stock for purchase by the stockholders of Narragansett at the price equal to the market value of said shares at the time of closing, determined as set forth below. The of-

fering will be made on a pro rata basis and Messrs. R. F. Haffenreffer, 3rd and Carl W. Haffenreffer, principal stockholders of Narragansett, who, together with family interests, own approximately 60% of the outstanding stock of Narragansett, have agreed to purchase at least 60% of these shares. In addition, the Messrs. R. F. Haffenreffer, 3rd and Carl W. Haffenreffer have agreed that they and their family interests will purchase from Narragansett all of the shares not purchased by other stockholders of Narragansett. It is intended that any of the shares acquired by Messrs. R. F. Haffenreffer, 3rd and Carl W. Haffenreffer and their family interests will be acquired as an investment and without present intent to sell or distribute the same. The offering to be made to Narragansett stockholders will be registered by the Company under the Securities Act of 1933. A registration statement will accordingly be filed with the Securities and Exchange Commission. This proxy statement will comprise the prospectus filed as part of the registration statement.

## CERTAIN CONSIDERATIONS RELATING TO THE PROPOSED ACQUISITION

Narragansett is a relatively small regional brewer. Its market is, as a practical matter, confined to the northeastern states where Falstaff has no distribution. While Narragansett's product has enjoyed good consumer acceptance in its territory, competition from the major national brewers is an increasing threat. Principal ownership of Narragansett rests in a few individuals who have, because of conditions in the brewing industry and for purposes of long range estate planning, for over ten years, been seeking a buyer for their interests and those of the other stockholders or some other method of strengthening Narragansett's competitive position. It was these persons who initiated negotiations with Falstaff. On the other hand, Falstaff faces sharply increased competition in its major markets, particularly in the south and southwest, where breweries are now being constructed by Anheuser-Busch and Schlitz, the nation's largest brewers. It needs further diversification of markets for its products, particularly in the northeastern states and in the populous centers of New York and Pennsylvania. It has no entree into these markets and believes that this can be provided, at least in

part, by its ownership of the Narragansett enterprise. It is believed that the interests of both companies and their stockholders will be best served by consummation of the proposed transaction. The terms and conditions of the proposed transaction were arrived at by arm's length negotiations between the parties.

Narragansett's business will be continued in substantially its present form by a subsidiary corporation organized by the Company for that purpose. At such time as Falstaff is in a position to introduce its beer into the northeastern states, it is planned to market it through Narragansett's distributor organization. Narragansett's officers and key personnel will be retained by the subsidiary corporation in their present capacities. They will retain their benefits under Narragansett's present pension plans, which will be continued by the subsidiary corporation. They will also be eligible to participate in the Company's Stock Option Plan.

The book value, at March 31, 1965, of the assets to be acquired by the Company will, after deduction of liabilities to be assumed by it, amount to $11,570,203 in contrast to the proposed purchase price of $19,500,000. At March 31, 1965, the fixed assets (other than bottles and cooperage) of Narragansett had a net book value of $6,254,803. It is, however, the belief of Management that the value of the assets to be acquired by the Company will be in excess of the cost to it of the assets acquired.

Narragansett has received an opinion of its special counsel, Messrs. Ropes & Gray, to the effect that gain or loss realized by stockholders of Narragansett upon receipt of the liquidating dividends will be recognized for Federal income tax purposes, such gain or loss representing capital gain or loss to stockholders in whose hands the stock of Narragansett is a capital asset. The amount of any such gain or loss in respect of any share will be the difference between the amount distributed per share to each stockholder and his tax cost for such share of Narragansett's stock held by him, and the deduction of any loss will be limited by the rules of the Internal Revenue Code relating to the deduction of capital losses.

Falstaff has been advised by it general counsel, Messrs. Willson, Cunningham & McClellan, that no gain or loss will

be realized by Falstaff for Federal income tax purposes upon its acquisition of the Narragansett assets.

No request for a ruling by the Internal Revenue Service on these matters has been made by Narragansett or Falstaff.

## SUMMARY OF THE AGREEMENT AND THE STOCK PURCHASE AGREEMENT

### Purchase Price

The Agreement provides that Narragansett will transfer and convey to the Company all of its business, property and assets (other than certain excepted items mentioned below). In payment therefor the Company will:

(a) Pay to Narragansett the sum of $17,500,000;

(b) Deliver to, or upon the order of Naragansett that number of shares of the Common stock ($1.00 par value) of the Company which will have an aggregate market value at the time of closing of $2,000,000, determined by the average of the closing sale prices on the New York Stock Exchange for each of the ten trading sessions immediately preceding such closing (or the mean between the low bid and high asked prices for any trading session in which no such sale was executed);

(c) Assume all of the debts, liabilities, obligations and commitments of Narragansett and its subsidiaries, except (i) taxes attributable to or arising out of the sale, transfer and conveyance of Narragansett's business, property and assets as provided for in the Agreement; (ii) a broker's commission of $150,000 to be paid by Narragansett for services rendered in negotiating the proposed sale; (iii) legal and other expenses incident to the sale; (iv) guarantees and warranties made to Falstaff by Narragansett, as set forth in the Agreement; and (v) the obligation of Narragansett to perform under the Agreement and to respond to claims, if any, asserted by its stockholders.

Among the items to be excepted and retained by Narragansett as mentioned above are its stock record books, minute books, corporate seal, copies of tax returns and other records relating to the corporate organization of Narragansett; shares of its own stock held in its treasury; and

the consideration received, and the rights enjoyed, by Narragansett under the Agreement.

**Conditions Relating to the Company's Obligation to Carry Out the Agreement.**

The obligation of the Company to carry out the Agreement is subject to the fulfillment of certain conditions, among which are the following: (a) that the Agreement has been approved by the holders of a majority of the Common shares of the Company voted at the Special Meeting; (b) that the representations made by Narragansett with respect to its assets and liabilities and other matters, as set forth in Section 5 of the Agreement, shall not have been shown or disclosed to have been untrue in any material respect as of the date when they were made; and (c) that Narragansett shall have complied with and performed its covenants as set forth in Section 6 of the Agreement.

**Conditions Relating to Narragansett's Obligations to Carry Out the Agreement.**

The obligation of Narragansett to carry out the Agreement is likewise subject to the fulfillment of certain conditions, among which are the following: (a) that the Agreement has been approved by the holders of at least two-thirds of the issued and outstanding shares of stock of Narragansett; (b) that the representations made by the Company with respect to its assets and liabilities and other matters, as set forth in Section 4 of the Agreement, shall not have been shown or disclosed to have been untrue in any material respect as of the date when they were made; (c) that the Company shall have complied with and performed its convenants as set forth in Section 6 of the Agreement; and (d) that Narragansett has been furnished with an opinion of counsel for the Company that the Common stock of the Company to be delivered to Narragansett at the closing will be validly issued, fully paid and nonassessable, not subject to preemptive rights of the other stockholders of the Company, and will be duly registered under Securities Exchange Act of 1934 and the Securities Act of 1933 and listed on the New York Stock Exchange.

**Warranties by Narragansett**

The Agreement provides in Section 8 for the warranty by Narragansett of the accuracy of the representations

made by it in Section 5 and an indemnification against loss to the Company caused by failure of Narragansett to perform its convenants contained in Section 6. These warranties will survive the closing, but are limited to those matters of which the Company has given Narragansett written notice on or before November 30, 1965.

**Undertaking to Register Shares**

The Company has agreed (Stock Purchase Agreement) that, under certain circumstances, it will, upon request and at its expense, register under the Securities Act of 1933 the shares of the Company's Common stock to be acquired by R. F. Haffenreffer, 3rd and Carl W. Haffenreffer and their family interests and, in such connection, will indemnify the Haffenreffers and their family interests against certain liabilities, including liabilities under the Securities Act of 1933.

**Closing**

The closing date for the purchase by the Company of the business, property and assets of Narragansett is July 15, 1965. Provision is made for extension of the date of closing in the event that, through no fault of the parties, closing cannot be effected on the date set. In the event that the transaction has not been closed on or before August 15, 1965 either party may terminate the Agreement.

**Department of Justice Inquiry**

The United States Department of Justice, in accordance with its usual procedure in matters of this type, has requested and has been furnished with detailed information from the Company and Narragansett for the purpose of determining whether the proposed acquisition by the Company of the assets of Narragansett might violate the antitrust laws. No opinion has been requested by the Company of Narragansett from the Department of Justice or from their respective counsel as to the legality of the proposed transaction under the federal antitrust laws.

**Labor Negotiations**

The labor contract with the Local of the United Brewary, Flour, Cereal, Soft Drink and Distillery Workers of

America, A.F.L.-C.I.O., representing approximately 475 Narragansett employees, expired on May 31, 1965. Pursuant to a vote of the members of this Local, work at the Narragansett Brewery stopped on June 17, 1965, although negotiations for renewal of the contract are continuing.

## THE COMPANY

Since its incorporation in 1933 in Deleware, Falstaff has been engaged in the production and sale of premium quality Falstaff beer. The Company's executive offices are located at 5050 Oakland Avenue, St. Louis, Missouri.

Sales of Falstaff beer by the Company in 1964 aggregated 5,819,659 barrels,* which, on the basis of published reports, placed Falstaff in fourth position in total sales volume in the United States brewing industry. Falstaff's major markets are in the midwest, south, southwest and southeast, and its breweries are located in St. Louis (2), Omaha, New Orleans, San Jose, Ft. Wayne, El Paso and Galveston.

As used herein, the term "Company" or "Falstaff" includes Falstaff Brewing Corporation and a subsidiary operating the Company's brewery in Indiana, but does not include a subsidiary to be organized in 1965 which will acquire the business, property and assets of Narragansett Brewing Company.†

For information with respect to financing of the acquisition of Narragansett, reference is made to LONG-TERM LOANS herein, and with respect to the business and properties of Narragansett, reference is made to BUSINESS AND PROPERTIES OF NARRAGANSETT.

## CAPITALIZATION

The following table sets forth the consolidated capitalization of Falstaff as of March 31, 1965, and as adjusted to give effect to the acquisition of Narragansett:

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* As used herein "barrels" refers to 31 gallon barrels.

† The term "Company" when used in the Narragansett financial statements and notes thereto contained in the proxy statement refers to Narragansett.

| | Outstanding | As Adjusted |
|---|---|---|
| Long-Term Indebtedness(a): | | |
| 4¼% Notes, due 1969 and 1970 | None | $ 4,500,000 |
| 5⅝% Sinking Fund Notes, due 1976 | None | 2,400,000 |
| 5% Note, due 1981 | $ 9,265,000 | 9,265,000 |
| 4⅞% Note, due 1985 | None | 12,000,000 |
| 4½% Note, due 1971 | 350,000 | 350,000 |
| 4½% Sinking Fund Debentures, due 1971 | 1,094,600 | 1,094,600 |
| Total | $10,709,600 | $29,609,600 |
| Capital Stock: | | |
| Preferred Stock (par value $20 per share), authorized 500,000 shares | None | None |
| Common Stock (par value $1 per share) authorized 6,000,000 shares(b)(c) | 4,490,456 shs.(c) | 4,564,531 shs.(c)(d) |

(a) See Note 6 to consolidated financial statements of Falstaff, Note 5 to consolidated financial statements of Narragansett, and "Long-Term Loans" herein, for additional information concerning long-term indebtedness, including modifications and extension of maturity dates, of the 5% Note due 1981 and the 5⅝% Sinking Fund Notes due 1976. See also Note 11 to consolidated financial statements of Falstaff for information covering obligations under long-term leases.

(b) Includes 72,882 shares reserved for issuance upon exercise of options which have been or may be granted under Falstaff's original Stock Option Plan or Falstaff's Amended Stock Option Plan. See "Stock Options". As of March 31, 1965, options covering 31,482 of such reserved shares were outstanding.

(c) Includes 50,200 shares of Common stock held in treasury of Falstaff at March 31, 1965.

(d) Includes 74,075 shares (estimated, based on a market value of $27 per share) to be delivered to Narragansett pursuant to the Agreement.

## DIVIDENDS

Falstaff has paid cash dividends on its Common stock in each year since 1937. The following table sets forth the dividends per share paid or declared on the Common stock of Falstaff during the periods indicated (adjusted retroactively for the 2-for-1 stock split in December, 1964):

| Year | Amount |
|---|---|
| 1960 | $.613 |
| 1961 | .65 |
| 1962 | .65 |
| 1963 | .70 |
| 1964 | .715 |

On April 9, 1965, Falstaff paid a quarterly dividend of 19¢ per share on its Common stock. The latest quarterly dividend of 19¢ per share is payable on July 13, 1965 to stockholders of record June 21, 1965. The purchasers of shares of Common stock after the record date will not be entitled to receive this dividend. Future dividends will be determined by the Board of Directors of Falstaff in the light of earnings, the financial condition of Falstaff and other relevant factors. Reference is made to LONG-TERM LOANS and Note 6 to the Consolidated Financial Statements of Falstaff for information concerning certain limitations upon the payment of dividends.

## PRICE RANGE OF COMMON STOCK

The following table sets forth the high and low sales prices of Falstaff's Common stock on the New York Stock Exchange during the periods shown (adjusted for the above-mentioned stock split):

| Year | High | Low |
|---|---|---|
| 1960 | 18¾ | 11 15/16 |
| 1961 | 22 1/16 | 17½ |
| 1962 | 19¾ | 14 |
| 1963 | 19¾ | 15⅛ |
| 1964 | 21⅞ | 15¾ |
| 1965 (through May) | 29⅜ | 21¾ |

On June 17, 1965, the last reported sale price on the New York Stock Exchange was $24.625.

## NARRAGANSETT BREWING COMPANY AND SUBSIDIARIES
## CONSOLIDATED STATEMENTS OF INCOME

The following consolidated statements of income of Narragansett Brewing Company and Subsidiaries for the five years ended December 31, 1964, have been examined by Arthur Andersen & Co., independent public accountants, as set forth in their opinion included elsewhere herein. The consolidated statements of income for the three months ended March 31, 1964 and 1965 have not been examined by independent public accountants. The unaudited statements of income including the related notes reflect, in the opinion of the Company, all known adjustments (which include only normal recurring adjustments) necessary to present fairly the results of operations for these three-month periods. The consolidated statements of income should be read in connection with the consolidated financial statements of Narragansett Brewing Company and Subsidiaries and the notes thereto included elsewhere herein.

| | Year Ended December 31, | | | | | Three Months Ended March 31, | |
|---|---|---|---|---|---|---|---|
| | 1960 | 1961 | 1962 | 1963 | 1964 | 1964 (Unaudited) | 1965(C) (Unaudited) |
| GROSS SALES, less returns and allowances | $25,823,281 | $30,980,187 | $33,092,352 | $35,839,263 | $37,431,428 | $7,564,871 | $8,001,931 |
| Deduct—Federal and state beverage taxes | 8,568,623 | 10,437,654 | 11,147,689 | 11,730,469 | 12,178,197 | 2,521,254 | 2,642,898 |
| Net sales | $17,254,658 | $20,542,533 | $21,944,663 | $24,108,794 | $25,253,231 | $5,043,617 | $5,359,033 |
| COST OF SALES | 11,127,059 | 14,003,908 | 15,205,791 | 16,427,656 | 17,030,999 | 3,400,325 | 3,665,362 |
| Gross profit | $ 6,127,599 | $ 6,538,625 | $ 6,738,872 | $ 7,681,138 | $ 8,222,232 | $1,643,292 | $1,693,671 |
| SELLING, ADMINISTRATIVE AND GENERAL EXPENSES | 5,212,959 | 6,067,359 | 5,867,998 | 6,474,999 | 6,849,110 | 1,531,180 | 1,651,931 |
| Operating income | $ 914,640 | $ 471,266 | $ 870,874 | $ 1,206,139 | $ 1,373,122 | $ 112,112 | $ 41,740 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| OTHER INCOME (EXPENSE): | | | | | | | |
| Interest income, primarily from U. S. Government obligations | $ 47,123 | $ 24,601 | $ 38,821 | $ 76,939 | $ 141,639 | $ 36,030 | $ 36,339 |
| Interest expense | (57,686) | (104,908) | (146,250) | (150,156) | (144,375) | (36,699) | (42,538) |
| Miscellaneous, net | 32,707 | 88,461 | 51,576 | 67,561 | 66,697 | 25,590 | 25,203 |
| | $ 22,144 | $ 8,154 | $ (55,853) | $ (5,656) | $ 63,961 | $ 24,921 | $ 19,004 |
| Income before provision for taxes on income | $ 936,784 | $ 479,420 | $ 815,021 | $ 1,200,483 | $ 1,437,083 | $ 137,033 | $ 60,744 |
| PROVISION FOR TAXES ON INCOME: | | | | | | | |
| Federal | $ 461,000 | $ 243,000 | $ 320,000 | $ 558,000 | $ 643,000 | $ 65,000 | $ 27,500 |
| State | 58,500 | 27,500 | 49,600 | 72,600 | 81,000 | 6,400 | 2,900 |
| | $ 519,500 | $ 270,500 | $ 369,600 | $ 630,600 | $ 724,000 | $ 71,400 | $ 30,400 |
| Net income | $ 417,284 | $ 208,920 | $ 445,421 | $ 569,883 | $ 713,083 | $ 65,633 | $ 30,344 |

Notes:

A. Commencing in 1962, changes, based on U. S. Treasury Department Guideline rules, were made in the estimated service lives of a substantial portion of the depreciable properties. Had the new lives been in use in 1960 and 1961 net income would have been decreased by approximately $100,000 in 1960 and $75,000 in 1961.

B. The Company's business is seasonal and accordingly the results of operations for the three months ended March 31, 1965, are not necessarily indicative of the results of operations for the year 1965.

C. The labor contract with the Local of the United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, A.F.L.-C.I.O., representing approximately 475 employees, expired on May 31, 1965. Pursuant to a vote of the members of this Local, work stopped on June 17, 1965, although negotiations for renewal of the contract are continuing.

## BUSINESS AND PROPERTIES OF FALSTAFF

### Products

Falstaff premium quality beer is sold at popular prices. In line with a long-established sales trend in the brewing industry, approximately 94.2% of Falstaff's 1964 sales, amounting to 5,819,659 barrels, consisted of packaged beer. The balance of Falstaff's 1964 sales was draught beer. The profit margin per barrel realized by Falstaff on packaged beer is somewhat higher than that realized on draught beer.

Packaged beer is sold by Falstaff in virtually all the types and containers customarily used in the industry. The primary distinction in the different types of packages is between returnable containers (bottles) and non-returnable containers (bottles and cans). During the past five years, the portion of Falstaff's packaged beer sales in non-returnable containers has increased from 50.6% to 58.6%. Generally, Falstaff expects this trend to continue.

The Company recently introduced the Falstaff Tapper for the serving of draught beer in the home and at picnics and similar occasions. This units hold 2½ gallons of draught beer, or the equivalent of a case of twenty-four 12-ounce cans or bottles. The tapper is a pressurized container, made of aluminum, which will fit readily into the normal household refrigerator. When empty, it may be returned in exchange for the purchase of a full tapper or for refund of the initial container deposit. To date, this unit has been offered in only a relatively small part of the Company's marketing territory and has not accounted for a significant part of the Company's sales. It is planned, however, to extend the offering to the balance of the territory, as well as to Narragansett's marketing territory, to the extent that a container of this type is permitted by existing malt beverage regulations. The Company does not believe that such regulations will limit, to any significant degree, Falstaff's plans. The tapper is produced by Reynolds Metals Company, which holds patents and copyrights with respect thereto. The Company's use of the tapper is on a non-exclusive basis. The marketing success of Falstaff beer through use of the tapper has not been proven, and no assurance is intended hereby that such marketing success will result.

The Company sells certain by-products of its brewing and malting processes such as spent grain, brewers yeast and barley and malt screenings. Aggregate sales volume of these by-products approximately one percent of the Company's net dollar sales.

**Distribution**

Falstaff beer is distributed in 32 states, the Company's major markets being the midwest, south, southwest and southeast parts of the United States. Falstaff beer is not distributed in the northeastern states. Except for the cities where plants are located and direct sales and deliveries are made, the distribution of Falstaff beer is made almost exclusively through approximately 600 wholesalers, 150 of whom handle Falstaff exclusively. The others handle one or more brands, usually premium price beers. There are only four branch operations: San Diego, Orange, Fresno and San Francisco, California. Approximately 80% of the Company's 1964 sales, expressed in terms of barrels, were accounted for by the wholesalers. No wholesaler accounted for more than 3% of the total sales for the year. Wholesalers operate under a buyer-seller relationship with the Company, which either party can terminate at will. The Company employs sales representatives to advise and counsel wholesalers and their sales forces. Advertising, including point-of-sale advertising, and sales promotion programs are furnished by the Company to help stimulate sales.

**Plants and Properties**

The Company owns and operates eight breweries. The location of these plants and their approximate productive capacities are shown below:

| Location | Approximate Productive Capacity In Barrels |
|---|---|
| St. Louis, Missouri | 600,000 |
| St. Louis, Missouri | 1,100,000 |
| Omaha, Nebraska | 700,000 |
| New Orleans, Louisiana | 1,100,000 |
| San Jose, California | 500,000 |
| Fort Wayne, Indiana | 1,000,000 |
| El Paso, Texas | 225,000 |
| Galveston, Texas | 1,200,000 |
| Total | 6,425,000 |

These breweries are all located on land owned in fee by the Company. All are well maintained and in good physical condition. Substantial annual expenditures are required for plant improvement and expansion and for the purchase of equipment and cooperage. For those purposes capital expenditures for the past five years have averaged approximately $6,000,000 per year.

In 1961 the Company acquired the malting plant of Albert Schwill and Company, Chicago, Illinois, in connection with the liquidation of that company. Its annual productive capacity of approximately 5,000,000 bushels of malt is used to meet the requirements of the Company's breweries. The Company owns no other malting facility. In 1964, the Company acquired the plant of Columbia Malting Company, located in Chicago, Illinois, immediately next to the Schwill plant. The Columbia plant was acquired for the purpose of providing space for the storage of grain used in the production of malt at the Schwill plant. It is now used for the purpose. Prior to the acquisition of the Columbia building, grain was stored in rented facilities.

The Company's executive office in St. Louis, Missouri, is in a building containing approximately 67,000 square feet, with adequate parking space. This property was built in 1957 and is owned by Falstaff Foundation, a Missouri not for profit corporation. It is rented to the Company under a 25-year lease at an annual rental of $135,000. In addition the Company pays all real estate taxes assessed against the property and provides for insurance, maintenance and upkeep. Falstaff Foundation is a charitable foundation of the type described in Section 501 (c) (3) of the Internal Revenue Code. The funds of this foundation, all of which are received from the Company or by way of returns on the foundation's investments, are disbursed for charitable purposes. The trustees and officers of the foundation, who act without compensation for their services, are executive officers or directors of the Company.

The Company also leases, under agreements which are generally cancellable within periods of less than one year, automobiles and trucks, accounting machines and other equipment and such warehouse space as is required in connection with its branch operations.

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UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

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| UNITED STATES OF AMERICA, PLAINTIFF, v. FALSTAFF BREWING CORPORATION, DEFENDANT. | Civil Action No. 3523 |

**SUPPLEMENTAL INTERROGATORIES TO BE ANSWERED BY THE DEFENDANT FALSTAFF BREWING CORPORATION**

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, plaintiff requests that defendant FALSTAFF BREWING CORPORATION (hereinafter referred to as "Falstaff"), by a duly authorized officer or agent, answer fully under oath, individually in writing the following supplemental interrogatories.

A. As used herein, "Northeast" shall mean and include the States of Maine, Vermont, New Hampshire, Connecticut, Rhode Island, New York, New Jersey and Delaware and the Commonwealth of Massachusetts and Pennsylvania.

B. As used herein, "Narragansett" shall mean the Narragansett Brewing Company, assets of which were purchased by Falstaff on or about July 14, 1965.

1. State Narragansett's total sales of beer, in terms of barrels and dollars, in each of the years 1960 through 1964 and for the first six months of 1965.

2. For each of the years 1960 through 1964, and for the first six months of 1965, state Narragansett's total sales of beer, in terms of barrels and dollars, in each of the following areas:

(a) The State of Connecticut;
(b) The State of Maine:
(c) The Commonwealth of Massachusetts;
(d) The State of New Hampshire;
(e) The State of Rhode Island;
(f) The State of Vermont.

3. State whether Falstaff maintained a prospective distributor file for any of the States in the Northeast and, if

so, state as to each, the date when Falstaff first began to maintain each such file.

4. As to each prospective distributor file listed in response to supplemental interrogatory 3 above, identify, by name and title, the person or persons who caused each such file to be established.

5. State the last known address of Norman J. Thomas, former Falstaff Manager of New Markets.

6. List and describe all reports, studies or surveys in the possession or control of Falstaff, prepared during the period January 1, 1960 to July 14, 1965, which relate or pertain to:

(a) Competitive conditions in the brewing industry in the Northeast or any part thereof and identify by name and address, the person, corporation or firm who prepared each such report, study or survey.

(b) The share of the beer market in the Northeast or any part thereof possessed by any brewing firm or firms.

(c) The volume of beer sales in the Northeast or any part thereof by any brewing firm or firms.

7. List and identify all minutes of Falstaff's annual shareholders' meetings, held during the period January 1, 1953 to July 14, 1965, which relate or pertain to either:

(a) Falstaff's actual, probable or possible sale of beer in the Northeast or any part thereof; or

(b) Falstaff's actual, probable or possible nationwide selling of beer.

8. List and describe all studies, reports, memoranda, correspondence, notes and other documents in the possession or control of Falstaff which relate or pertain to the negotiations for the purchase of or to the purchase of Narragansett's source by Falstaff, other than such documents submitted to plaintiff prior to the filing of the complaint herein;

(a) by Falstaff and Narragansett in voluntary response to plaintiff's letter dated March 22, 1965 addressed to James S. McClellon, Esquire and Roger A. Moore, Esquire;

(b) by Falstaff in response to Civil Investigative Demand Number 0633 dated June 3, 1965; and

(c) by Narragansett in response to Civil Investigative Demand Number 0634 dated June 7, 1965.

Dated: New York, New York
April 11, 1966

/s/
ROBERT D. CANTY
Attorney, Department of Justice

/s/
PHILIP F. CODY
Attorney, Department of Justice

To:
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UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

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|---|---|
| UNITED STATES OF AMERICA, PLAINTIFF, v. FALSTAFF BREWING CORPORATION, DEFENDANT. | Civil Action No. 3523 |

**ANSWERS OF DEFENDANT FALSTAFF BREWING CORPORATION TO SUPPLEMENTAL INTERROGATORIES OF THE PLAINTIFF**

To: Robert D. Canty
Philip F. Cody
Attorneys, Department
of Justice.

The following are the answers of defendant, Falstaff Brewing Corporation, to the supplemental interrogatoires 1 to 8, inclusive, directed to defendant, to be answered pursuant to Rule 33:

1. and 2. Attached hereto and made a part hereof are schedules giving the information requested.

3. and 4. Defendant has for many years maintained files to contain inquiries received from persons wishing to become distributors of its product and copies of the replies made thereto. These inquiries have been received not only from persons in the United States, but throughout the world. As to inquiries received from persons in the United States, including the "Northeast" states, the files are maintained on a state basis. The defendant's records do not disclose when this filing procedure was established or by whom. It has, however, been in existence for at least 25 years. Specifically, a separate file for each state, including each state in the "Northeast" was maintained during that period.

5. The last known address of Norman J. Thomas is 59 Indian Hills Trail, Louisville, Kentucky.

6. (a) through (c).

1. U.S.B.A. Consumption Data (6 New England States) 1960 through 1964. Report prepared by de-

fendant's market research department for Alvin Griesedieck, Jr. defendant's director of marketing, under data of March 30, 1965.

2. Report dated June 18, 1965, prepared by market research department to show Narragansett sales in relation to industry sales in 1963 and 1964 in the States of Rhode Island, Vermont, Connecticut, Massachusetts, Maine, and New Hampshire; comparison of Narragansett brand sales during the first four months of 1964 and 1965, and comparison of Narragansett sales with those of competing brands in 1963 and 1964 in the States of New Hamsphire, Maine, Massachusetts, Connecticut, Vermont, and Rhode Island.
3. Modern Brewery Age Blue Books, an annual publication received by defendant lists breweries by state, showing personnel, capacity, and brands.
4. Brewing Industry Survey, an annual publication published by Research Co. of America, is received by defendant. It shows sales (or estimates) for past 5 years for each brewery, but not by state.
5. Brewers Almanac is an annual publication of the United States Brewers Association, is received by defendant. It shows malt beverage consumption by states by months, but only as to the industry and not as to brands. Monthly consumption bulletins are also issued.
6. A report relative to the New York City—Northeastern New Jersey area was prepared as of February 26, 1962, by the Research Department (Lloyd Miller) of the defendant's advertising agency, Dancer-Fitzgerald-Sample, of New York City. It discusses area population, estimated beer potential, media data, general market data, available industry statistics, etc.
7. In the possession of defendant is a copy of the October 1963 "Beer Survey" prepared by N.Y. Journal-American. It reports, with regard to four boroughs in New York, as to certain marketing information in this area.
8. In the possession of Falstaff is an analysis prepared in June 1965 by Narragansett personnel analyzing beer sales, by volume and by package in the

New England States during period 1960 through 1964, containing a section on pricing of various brands in this area and showing Narragansett's distribution by areas.

7. (a) and (b). Attached hereto and made a part hereof are excerpts extracted by Harry J. Pettey, Secretary of defendant, from minutes of annual meetings of stockholders held during the period, and relating to the subjects, specified in this interrogatory.

8. During the period from approximately January, 1965, when the negotiations which resulted in the purchase by defendant of Narragansett's assets were commenced to the conclusion of the transaction there was much correspondence by the officers, key personnel, and attorneys of defendant and Narragansett, between each other and with others, concerning the consummating of the purchase and many reports, documents, and memoranda, etc., were made and prepared. They related to the following subjects: (a) Financial information; (b) The issuance of securities and registration thereof under the Securities Act of 1933; (c) Preparation of letter of intent and ultimately the formal agreement, and matters related thereto; (d) arrangements by defendant for insurance company and bank loans, and matters related thereto; (e) matters concerning the assets to be purchased and liabilities to be assumed; (f) matters concerning management, salaries, and pension benefits; (g) information regarding Narragansett's distributing organization, its markets, its sales, its advertising, and related matters; (h) the title to Narragansett's real estate; (i) examination of its outstanding commitments to be assumed by defendant.

Dated: St. Louis, Missouri
May 16, 1966

FALSTAFF BREWING CORPORATION
By /s/ J. H. Wemhoener
Vice President

STATE OF MISSOURI }
CITY OF ST. LOUIS } ss.

J. H. WEMHOENER, being first duly sworn, states that he is Vice President of defendant, FALSTAFF BREWING CORPORATION, and authorized by said corporation

to make this verification on its behalf; that as such Vice President of said corporation, affiant has read the foregoing answers to plantiff's supplemental interrogatories and states that they are true.

J. H. WEMHOENER

Subscribed and sworn to before me, this 16th day of May, 1966. My commission expires June 26, 1967.

HELEN HENKE
Notary Public

WARREN F. FARR
Ropes & Gray
225 Franklin Street
Boston, Massachusetts
02110

Matthew W. Goring
Hinckley, Allen, Salisbury
& Parsons.
2200 Industrial Bank Building,
Providence, Rhode Island
02903

## QUESTION 1

### NARRAGANSETT BREWING COMPANY

### SALES—IN TERMS OF BARRELS AND DOLLARS FOR THE YEARS 1960 THROUGH 1964, AND FOR THE FIRST SIX MONTHS OF 1965

| Period | Barrels Sold | Dollar Sales Gross—Per Co. Records |
|---|---|---|
| Year - 1960 | 893,557 | $26,498,659 |
| Year - 1961 | 1,094,474 | 31,689,825 |
| Year - 1962 | 1,160,563 | 33,908,590 |
| Year - 1963 | 1,226,473 | 36,423,892 |
| Year - 1964 | 1,274,945 | 38,387,017 |
| 1st 6 Month - 1965 | 607,508 | 18,177,673 |

May 11, 1966

## NARRAGANSETT BREWING COMPANY

### SALES - IN TERMS OF BARRELS AND DOLLARS (BY STATES LISTED) FOR THE YEARS 1960 THROUGH 1964 AND FOR THE FIRST SIX MONTHS OF 1965

| PERIOD | CONNECTICUT | | MAINE | | MASSACHUSETTS | | NEW HAMPSHIRE | |
|---|---|---|---|---|---|---|---|---|
| | BARRELS | GROSS DOLLARS | BARRELS | GROSS DOLLARS | BARRELS | GROSS DOLLARS | BARRELS | GROSS DOLLARS |
| Year - 1960 | 61,563 | $1,873,962 | 89,945 | $2,581,851 | 317,608 | $ 8,836,223 | 39,879 | $1,213,450 |
| Year - 1961 | 62,623 | 1,906,451 | 111,131 | 3,036,895 | 376,222 | 10,148,251 | 57,936 | 1,763,002 |
| Year - 1962 | 62,271 | 1,913,539 | 113,818 | 3,167,361 | 416,917 | 11,359,551 | 68,346 | 2,081,731 |
| Year - 1963 | 75,691 | 2,351,989 | 125,515 | 3,591,479 | 457,531 | 12,755,997 | 77,632 | 2,383,888 |
| Year - 1964 | 76,445 | 2,472,121 | 126,854 | 3,739,383 | 504,252 | 14,027,371 | 79,325 | 2,486,338 |
| 1st 6 Months - 1965 | 37,198 | 1,162,845 | 63,033 | 1,895,049 | 257,555 | 7,070,770 | 36,100 | 1,136,947 |

| RHODE ISLAND | | VERMONT | |
|---|---|---|---|
| BARRELS | GROSS DOLLARS | BARRELS | GROSS DOLLARS |
| 371,508 | $11,639,955 | 12,715 | $341,173 |
| 373,308 | 11,783,651 | 19,075 | 514,820 |
| 372,824 | 11,889,271 | 21,301 | 578,914 |
| 373,494 | 12,085,101 | 22,209 | 590,972 |
| 300,692 | 12,572,867 | 21,929 | 597,662 |
| 168,514 | 5,624,396 | 8,933 | 256,073 |

**EXCERPTS FROM ANNUAL MEETING OF SHAREHOLDERS OF FALSTAFF BREWING CORPORATION HELD MARCH 23, 1959**

"Question was asked regarding expansion of additional territories. Mr. Griesedieck stated we have not opened any new major territories, however, we have gone into South Carolina and some points in Georgia. We have not entered into any major markets, such as Detroit or that type of large area, however, the Florida area is where we would like to have a brewery. We cannot continue to serve that market out of the New Orleans or Fort Wayne plants. He further stated Northern California is going on in very good shape and sometime in the future, capacity will be needed in the Southern California area, but at the present time there is nothing worthwhile available."

I, the undersigned, Harry J. Pettey, do hereby certify that I am Secretary of the Falstaff Brewing Corporation and that the above is a true and exact copy of the excerpt from the Annual Meeting of Shareholders held March 23, 1959 as it appeared in the Minute Book of the Corporation.

Witness my hand and the seal of the Corporation this 3rd day of May, 1966.

Harry J. Pettey

**EXCERPTS FROM ANNUAL MEETING OF SHAREHOLDERS OF FALSTAFF BREWING CORPORATION HELD MARCH 27, 1961**

"A stockholder from Wisconsin stated that Green Bay had a professional football team and since Falstaff has become involved in football, a tremendous interest in Falstaff in Wisconsin has developed and people are inquiring when Falstaff will open that market. Mr. Griesedieck stated that we have looked into the possibility of opening this market, but since that state is predominantly a premium-priced beer state, it would not be practical to enter that market at the present time. Also we have set up a timetable in connection with our projections and we cannot open too many markets too rapidly. We realize that Wisconsin is a big potential market and since our goal is to eventually have Falstaff distributed on a national basis, we think that we will get into Wisconsin one of these days."

I, the undersigned, Harry J. Pettey, do hereby certify that I am Secretary of the Falstaff Brewing Corporation and that the above is a true and exact copy of the excerpt from the Annual Meeting of Shareholders held March 27, 1961 as it appeared in the Minute Book of the Corporation.

Witness my hand and the seal of the Corporation this 3rd day of May, 1966.

Harry J. Pettey

**EXCERPTS FROM ANNUAL MEETING OF SHAREHOLDERS OF FALSTAFF BREWING CORPORATION HELD APRIL 27, 1964**

"He (Mr. Griesedieck) mentioned several new markets that had been opened including Chicago, Illinois and Washington, D. C. National distribution is still Falstaff's eventual goal."

I, the undersigned, Harry J. Pettey, do hereby certify that I am Secretary of the Falstaff Brewing Corporation and that the above is a true and exact copy of the excerpt from the Annual Meeting of Shareholders held April 27, 1964 as it appeared in the Minute Book of the Corporation.

Witness my hand and the seal of the Corporation this 3rd day of May, 1966.

Harry J. Pettey

**EXCERPTS FROM ANNUAL MEETING OF SHAREHOLDERS OF FALSTAFF BREWING CORPORATION HELD APRIL 26, 1965**

"He (Mr. Griesedieck) also announced that at the present time, we were proceeding with management at Narragansett to formalize a contract in connection with acquisition of their brewing company. He stated that we hoped to have this completed shortly and then we will proceed to develop the necessary proxy material for submission to the Stockholders. He noted that our Production staff had made a total inspection of this plant and their report indicates a great number of possibilities for the future. The management of Narragansett is very capable and it is Falstaff's intention to continue the operation of the company under the present management. Their distribution is in the Northeastern states and Falstaff does not have any markets in that area. He stated that at the present time, Falstaff does not have any plans to market Falstaff in that area, but would continue with the Narragansett brand."

I, the undersigned, Harry J. Pettey, do hereby certify that I am Secretary of the Falstaff Brewing Corporation and that the above is a true and exact copy of the excerpt from the Annual Meeting of Shareholders held April 26, 1965 as it appeared in the Minute Book of the Corporation.

Witness my hand and the seal of the Corporation this 3rd day of May, 1966.

Harry J. Pettey

DISTRIBUTORS

August 31, 1960

Falstaff Brewing
St. Louis
Missouri

Gentlemen:

This letter is written pursuant to representing Falstaff's in Fairfield County, Connecticut, in which territory we have been wholesale beverage distributors for the past 18 years.

We are the exclusive distributors for the Schlitz Brewing Company and the Amstel Brewing Company in Fairfield County. We have six salesmen, a sales manager, a merchandising man and five trucks exclusively on beer, giving us coverage in this area.

We would appreciate an opportunity to discuss this matter further with your representative at either your place or our place of business.

Sincerely yours,

L. HERMAN LAVIT CO., INC.

Joseph Backer
Sales Manager

JB:LI

1 1011

SEP 5 A.M.

September 4, 1940

Mr. Joseph Rasher
L. Herman Levit Co., Inc.
800 South Avenue
Bridgeport 4, Connecticut

Dear Mr. Rasher:

Thank you for your very nice letter of August 31st in which you inquire into the possibility of our consideration of you distributing Falstaff in Fairfield County, Connecticut.

It is a definite part of our marketing philosophy not to consider any territory that is not contiguous with our present trading area. We do this for the very good reason of consecutive advertising and sales manpower coverage. Presently our eastern most point of distribution in your direction is the Indiana - Ohio line which is serviced from our plant in Fort Wayne, Indiana.

We have been in the fortunate position, these past several years, of being in practically a sold out condition during the critical beer months of May through October and currently we are expanding the capacities at several of our plants to correct this condition, however, the program will not be completed until the latter part of 1941. In between this time we intend to re-evaluate the possibilities of expansion into new market areas.

I am placing your letter in our prospective distributor file and should anything develop at a later date that would be of interest to you, we will be pleased to contact you for further discussion in the matter.

We appreciate your interest in writing to us and for your desire to become associated with Falstaff - America's Premium Quality Beer - as one of its distributors.

Most cordially yours,

FALSTAFF BREWING CORPORATION

Herman J. Thomas
Manager of New Markets

HJT:tp

SANTER DISTRIBUTORS, INC.

437-441 BANK ST.
NEW LONDON, CONN.
TEL: DIBSON 3-4781

April 14, 1962

Mr. Norman J. Thomas
Falstaff Brewing Corp.
5050 Oakland Avenue
St. Louis, Mo.

Dear Mr. Thomas,

I contacted you late in 1959 regarding the possibility of Falstaff coming into Conn.

Since then I understand it is available in Maryland, which is not too far from here. I wish to remind you that I am still very much interested in being appointed a distributor.

As you probably know, we have several military installations in this vicinity, and I am sure Falstaff would be in demand at the various bases once it is available.

Trusting I will hear from you soon I remain

Yours very truly,
SANTER DISTRIBUTORS, INC.

Sid L. Santer, Treas.

May 1, 1962

Mr. Sid L. Sauter, Treasurer
Sauter Distributors, Inc.
437-441 Bank Street
New London, Connecticut

Dear Mr. Sauter:

Please excuse our belated answer to your recent letter with regard to a distributorship in the New London, Connecticut marketing area.

Your letter was referred to me by Mr. Norman Thomas, who is no longer the Sales Manager of New Market Operations. Mr. Thomas is now coordinator of our Amstel Holland Import beer for our Falstaff marketing area.

Rest assured, when we make a further survey in the Virginia marketing area, you will be contacted with regard to the New London marketing area.

Very best regards,

FALSTAFF BREWING CORPORATION

Al Sorenson
Manager of New Market Operations

AS:mah

1 1020

Everett Scanlon
245 Burnham Street
East Hartford, Connecticut

Falstaff Beer Company
Sales and Distribution Office
St. Louis, Missouri

Sir:

On a recent trip to Florida I noticed that your company had extended the sale of Falstaff Beer into that area. The thought occurred to me that it was possible that you might be thinking of extending into other areas.

I am writing you to inquire about a Distribution Franchise in this area. While I haven't any figures to mention I am compelled to take this opportunity to ask.

I would appreciate hearing from you at your earliest convenience.

Thanking you, I am

Sincerely,
Everett Scanlon
Everett Scanlon

1 1023

APR 18 AM

April 27, 1962

Mr. Everett Scanlon
345 Burnham Street
East Hartford, Connecticut

Dear Mr. Scanlon:

We certainly appreciate your recent letter of inquiry with regard to Falstaff and I would like to acknowledge same.

At this time, we have no plans for entering the Connecticut marketing area, however, should we ever anticipate opening markets in Connecticut, I would like to assure you that you will be contacted with regard to Falstaff in the East Hartford area.

Very best regards,

FALSTAFF BREWING CORPORATION

Al Sorenson
Manager of New Market Operations

AL:mah

1 1022

PHONE [redacted]

21 S.

**Fairfield County Beverage Distributors, Inc.**

POST OFFICE BOX 3434
BRIDGEPORT 4, CONN.

March 4, 1963

Gentlemen:

This is to advise you that we have applied for a wholesale beer permit, and expect to have same by approximately March 20, 1963.

For the past ten years, we have been distributing soft drink beverages to chain and independent stores in the Fairfield County area, excluding Danbury.

We have been appointed to be distributors for Food Fair stores in Connecticut for private label beer and will do so by April 1, 1963. At the present time, we are looking for a beer line to sell with our soft drinks.

Kindly advise us if you have a line available. If you do so, we would appreciate it very much if you would consider us as your distributor.

Thanking you for your kind consideration, we are,

Sincerely yours,

FAIRFIELD COUNTY BEVERAGE DISTRIBUTORS

Jack Greengarden

Jack Greengarden, President

JG:JBG

1 1075

MAR 6 ACD

The STERLING
BEVERAGE COMPANY

DISTRIBUTOR OF QUALITY BEER AND ALE • TELEPHONE CH 8-3173

2 BROADWAY
HAMDEN 14, CONNECTICUT

May 28, 1963.

Falstaff Brewing Corporation,
3617 Olive St.
St. Louis, Mo.

Attention: President

Dear Sir:

We heard that you were planning to have your beer products come into the State of Connecticut, and would need a distributor for the Falstaff line and also for your newly acquired line of Rheingold.

If this is the case, we would appreciate receiving particulars on these lines, and any consideration you might give us as a distributor. We have been distributors in this territory for many years.

Very truly yours,
The Sterling Beverage Co.
J. Andre Gionette
J. Andre Gionette, President.

1 1024

MAY 31 A.M.

April 7, 1964

Mr. J. Andre Gunnette
Sterling Beverage Company
No. 2 Broadway
Hampton 14, Connecticut

Dear Mr. Gunnette:

We certainly appreciate your most recent letter of interest in distributing Falstaff in the Hampton, Connecticut marketing area. It is true that we are immediately planning further distribution of our product in the Washington, D.C. and Maryland markets surrounding the D.C. cluster area of influence.

We are not contemplating any immediate future expansion other than the D.C. cluster at this time. Please be assured that should our plans change to include further distribution in your marketing area, you will certainly be contacted by us with regard to the distribution of Falstaff.

Again, many thanks for your interest.

Very best regards,

FALSTAFF BREWING CORPORATION

Al Sevenoak
Sales Manager of New Market Operations

AS:rm

1 1014

September 9, 1964

Mr. Mark Infeld
The Infeld Metals Co.
Falls Avenue
Waterbury, Connecticut

Dear Mr. Infeld:

Your recent letter to Falstaff Brewing of inquiry with regards to a distributor operation within the Waterbury, Connecticut marketing area has been forwarded to me for further action.

We certainly appreciate your interest in becoming a Falstaff beer distributor. However, at this time the Connecticut marketing area is not included in our immediate expansion plan. Please be assured, though, that should our plans be changed to include the Connecticut marketing area, you certainly will be contacted with regard to the distribution of our product.

Again, many thanks for your interest.

Very best regards,

FALSTAFF BREWING CORPORATION

Al Sorensen
Sales Manager - New Market Operations

AS:em

1 1015

SPECIALTY PROCESSORS ... NON-FERROUS METALS

THE INFELD METALS CO.

FALLS AVENUE, WATERBURY, CONN.

Aug. 18, 1954

Falstaff Brewing Co. Inc.
3930 Oakland Ave.
St. Louis 10, Mo.

Attention: Marketing Manager

Gentlemen:

For quite some time we have been looking to diversify our interests in the East.

With this in mind, we have been aware your name as being one of the top ten breweries in the United States, and have not seen any of your products distributed on the East Coast or New England.

We feel that supplying the Conn. area with Falstaff beer would be a mutually beneficial venture for both of us. It was understood that last year when you negotiated to buy Ballantine Breweries that you would start to distribute Falstaff in this area. Since the merger talks were to no avail we would like to take this opportunity to become involved in the beer distributing business in the state of Connecticut.

We will realize the difficulty in getting not only beer but all new products started in a new area. With our long established experience in business we feel the need for new products on the East Coast. We have therefore turned to your organization as a start.

Hoping to hear from you in the near future, we are

Very truly yours,

Mark Infeld

The Infeld Metals Co.

1 A01

AUG 24 1954

October 19, 1964

Mr. Benedict C. Votrano, Broker
P. O. Box 806
Bristol, Connecticut

Dear Mr. Votrano:

It was certainly a pleasure visiting with you at the recent NBMA Convention.

Please be assured that when we plan on including the Connecticut marketing area within our distribution area, you will certainly be contacted.

Very best regards,

FALSTAFF BREWING CORPORATION

Al Sorensen
Sales Manager, New Market Operations

ms

1 AC20

SANTER DISTRIBUTORS, INC.

55-57 Bliman St.,
NEW LONDON, CONN.
TEL: GIBSON 3-4783

March 20,1965

Mr.Alvin Griesedieck
Falstaff Brewing Corp.
5050 Oakland Ave.,
St.Louis 10, Missouri

Dear Mr. Griesedieck:

On February,8,1964, I wrote you regarding the possibility of Falstaff coming to Connecticut. My letter was forwarded to Mr. Frank Crimmins, whom I understand is in charge of Military Sales.

The fact that Falstaff has recently purchased the Narragansett Brewing Co., has changed the situation, and since my interest in Falstaff has not lessened, I would appreciate having you let me know who will be in charge of this area, or advise me whom I could contact to get this information.

Yours very truly,

Sidney L. Santer,President
SANTER DISTRIBUTORS,INC.

SLS/bb

1 1019

MAR 29 1965

Copy Hos. File

SANTER DISTRIBUTORS, INC.

55-57 Bliss Street
NEW LONDON, CONN.
TEL: GIBSON 3-4783

March 24, 1965

Mr. Larry Dallas
Falstaff Brewing Corp.
5050 Oakland Avenue
St. Louis 10, Mo. 63110

Dear Mr. Dallas,

In regard to our telephone conversation of March 22, 1965, I hereby submit the following resume of my warehouse layout and sales organization:

Brands distributed---Schmidt's of Phila., Blatz, Carlsberg
Territory covered--New London, Windham county, part of Middlesex county
Accounts----------472 off-premise
327 On-premise
Sales organization- 4 salesmen
Drivers ---------- 3 drivers in uniforms
Trucks------------ 4 trucks painted to brewery specification

Warehouse size----- 9,500 sq. ft. (diagram enclosed)
Palletized -------- cases and kegs completely palletized for loading and unloading. stack pallets two high
Keg Cooler--------- 80 x 35 x 12 ft.high. Capacity 600 ½'s

I would like to take this opportunity to thank you and I believe the enclosed information covers everything you requested.

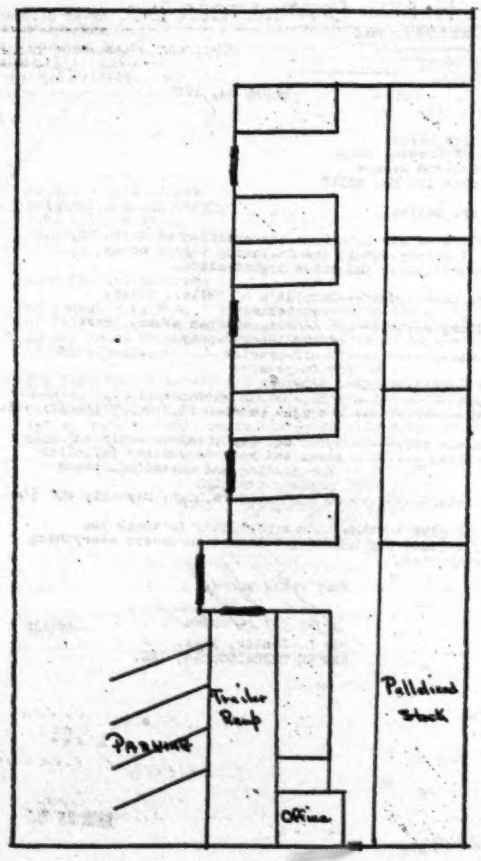
Very truly yours,

Sid L. Santer, Pres.
SANTER DISTRIBUTORS, INC.

SLS/hb
Encl.

1 101

MAR 26 19[illegible]




1-1018

C. N. & N. BEER DISTRIBUTORS, INC.
HIGH STREET • HOCANUM, CONNECTICUT

Gentlemen:

In anticipation of your moving in to the Connecticut market, we would appreciate consideration for the distribution of your Falstaff label.

We now cover Middlesex, New Haven, Tolland, and Litchfield Counties at the moment we carry neither a regional or a premium priced beer as you will note by the enclosed listing.

Thank you in advance for any consideration shown.

Sincerely yours
Charles F. Carlin,
Secretary

1 1013

APR 8 1935 P.M.

April 8, 1965

Mr. Charles F. Carlin
C.M. & M. Beer Distributors, Inc.
High Street
Higganum, Connecticut

Dear Mr. Carlin:

Thanks very much for your recent letter in which you express an interest in the distribution of Falstaff products within your present trade area. It was very nice hearing from you.

We do not anticipate an early entry into your area with Falstaff, but as aforementioned we are very appreciative of your interest. Please rest assured that your letter will definitely be kept in our prospective distributor file and when we do accomplish survey work in Connecticut that a Falstaff field representative will call on you.

Very truly yours,

FALSTAFF BREWING CORPORATION

Larry Dallas
Sales Manager, New Market Operations

ms

1 .01/

Dennis Bottling Company
MANUFACTURERS OF
University Club Beverages
ELLSWORTH, MAINE

September 21, 1960

Falstaff Brewing Corp.
3617 Olive Street
St. Louis 8, Mo.

Gentlemen:

We have written to you several times in the past as to the possibility of your opening the Bangor section of Maine.

We are still very much interested in Falstaff and would welcome an opportunity to discuss this market in detail with you.

We await your reply with interest.

Very truly yours,

DENNIS BOTTLING COMPANY

LD:ED

1 1030

United Distributors of Maine
80 ADAMS STREET
AUBURN - - MAINE
Tel. 783-5161

March 30, 1961

Falstaff Brewing Corp
St. Louis, Mo.

Gentlemen:

I read in the March 29th. issue of the Wall Street Journal that you would soon be "looking at some new markets".

Does this mean that you might come to Maine?

Very truly yours
United Distributors of Maine
AJB/J. Baumer
Alex J. Baumer

1 1029

APR 4 A.M.

"MAKING FRIENDS IS OUR BUSINESS"

NATIONAL DISTRIBUTORS INCORPORATED

FRANK J. GAZIANO
PRESIDENT

June 12, 1962

12 YORK STREET
PORTLAND, ME.
DI 5-1719

Mr. R. B. Wightman,
General Sales Manager,
Falstaff Brewing Corp.,
5050 Oakland Ave.,
St. Louis, 10, Missouri.

Dear Mr. Wightman:

It may seem somewhat premature to write you at this time, but one cannot follow the sales and distribution growth of Falstaff Beer without realizing that it may not be long before you will be seeking to capture a share of the Maine Beer Market, once you realize just what Maine has to offer.

Because we are a forward-looking organization we want you to know something about us - who we are, how we operate, and what we are in a position to do for our principals. We are the "hottest"-beer wholesalers in the State of Maine.

Your own record, of course, speaks for itself.

We're a young organization - born January 2, 1960 - but comprised of seasoned beer men, from the ground up. The writer spent twelve years with Anheuser-Busch - starting as a salesman in their Boston Branch and progressing upwards to the position of Divisional Sales Manager for all New England. I resigned to become the Budweiser wholesaler in Portland, Maine.

During the past two-and-a-half years we have developed a strong, aggressive selling and delivery organization, for we fully realize the importance of merchandising and service.

Since the first month we were in business we have shown substantial and continuous sales increases in Budweiser (our top line) sales. Last year we received a special award from Anheuser-Busch for the highest percentage of sales increase of any Budweiser Maine wholesaler. We're doing equally as well in 1962.

Our territory - All of York County, Maine

Cumberland County, Maine, except Brunswick, which we could service on other brands.

A small portion of Oxford County

1 1032

JUN 15 P.M.

Our salesmen personally call on every retail licensee in our territory, at least once each week. Customers who require more frequent service are visited by our salesmen two or more times each week - with service frequency adjusted to the season. Our salesmen's calls are backed up by telephone calls to selected customers who buy on a daily basis.

Maine is a "cash law" state - to the retailer and to the consumer. Maine is also a "pre-bill" state. This means that a wholesaler must be prepared to give frequent service. The frequency of service we have established has resulted in many extra sales for our brands.

There are no local breweries in Maine, so the retailers and consumers are friendly to outside brands. There are seven major brands in competition in the state - brands which each sell a million gallons or more annually in Maine. Listed in order of volume, these are:

Narragansett
Budweiser
Carling's
Schlitz
Ruppert
Ballantine's
Schmidt's

Maine is a "natural" for Falstaff Beer. It is one of the greatest vacation and recreational areas in the nation. Millions of people from all over the country - and from Canada, too - visit this area each year for both summer and winter activities.

You can FOLLOW your customers as they enjoy themselves AWAY from the places where they usually enjoy Falstaff Beer by adequate representation in Maine. If you overlook the opportunities offered in Maine, you INVITE your customers to drink other brands, and these other brands, which of necessity must be regional or national, could FOLLOW YOUR CUSTOMERS HOME.

We at National Distributors are sales-minded and service-minded to the Nth degree. Many of our methods and policies are the same ones we used successfully while we were associated with Anheuser-Busch.

We are adequately staffed and adequately financed.

Our salesmen follow up-to-date route books; they merchandise and peak-out in every outlet on every call; we maintain individual sales-record cards for each customer, so each brand receives proper attention in each outlet; our drivers are neatly uniformed; our trucks are attractively painted and maintained.

The writer personally circulates through the trade every working day, so he has the pulse of the retail trade at all times. We are promotion minded and develop our own selling ideas, such as:

Last year, a rowboat full of beer used in key outlets
Last winter, a SLEIGH filled with beer
This year, horse-and-wagon delivery to our customers.

Our plans for the future include the building of a new modern warehouse where our palletized operation can be used to its fullest extent.

We'd like to talk to you some more about Maine - and National Distributors, Inc. - and Falstaff, too - at the appropriate time. We know that with the kind of promotion for which you are noted, and the kind of selling and merchandising job we are capable of doing, Falstaff could get ready acceptance in Maine.

When the time comes, WE'D LIKE TO BE THE KEY WHOLESALER FOR YOU IN THE STATE OF MAINE.

Cordially,

Joseph J. Mazzeo
President

FJCazzano

1 1034

July 9, 1962

Mr. Frank J. Gaetano, President
[illegible] Distributors, Inc.,
[illegible]
[illegible], Maine

Dear Mr. Gaetano:

Your letter of June 12, addressed to Mr. [illegible], has been forwarded to us for further action. We certainly appreciate your interest in Falstaff and want to thank you for your very informative letter.

Falstaff is now marketed in a 22-state area, extending eastward into Ohio. We are not contemplating expansion into the northeast area in the foreseeable future.

We have placed your letter in our Prospective Wholesaler file for future reference and, should we undertake marketing this area, your license will be given every [illegible] consideration.

Very best regards,

FALSTAFF BREWING CORPORATION

Al Servatius
Sales Manager
New Market Operations

Admah

1 1031

DIRIGO DISTRIBUTORS, Inc.
998 CONGRESS STREET
PORTLAND, MAINE

Bruce

April 13, 1963 (b)

Mr. Joseph Griesedieck, President
Falstaff Brewing Corporation
St. Louis, Missouri

Dear Mr. Griesedieck:

Please be advised that we are definitely interested in handling products of the Falstaff Brewing Corporation. We, of Dirigo, are quite familiar with the fruits of your production, and would welcome the opportunity to represent you in this area.

The enclosed brochure will provide: (1) a brief history of our organization; (2) a synopsis of our operational methods; (3) an outline of what we could offer your corporation in this area.

As many large corporations have learned, Maine is an excellent market to develop. More and more industries and manufacturers are taking advantage of the opportunities of this market. Being a vacationland, the summertime population swells to great proportions, increasing the demand for different varieties of merchandise.

We believe, that a very creditable merchandising plan put into operation in this area could profit both Falstaff Brewing Corporation and Dirigo Distributors, Incorporated.

Sincerely yours,

Leonard V. Russo
Vice President

jd/LR

1 1036

# DIRIGO DISTRIBUTORS, Inc.

990 CONGRESS STREET

PORTLAND, MAINE

## FOREWARD

The name DIRIGO was taken from the state of Maine crest and was chosen because it denotes leadership i.e., "I Lead" ... this was done during the conception of the company back as early as 1922, when the company originally began business as a bottling firm, under the leadership of Ciro Russo and Vito Caggiano. During the succeeding years Dirigo grew in stature throughout Cumberland and York counties, and many of their products reached as far north as Aroostook county.

During the year 1933, when the state voted to permit the sale of malt liquor in the state of Maine, DIRIGO again led the field by obtaining the distributor contracts for many of the leading breweries. Among the many were SCHMIDT'S of PHILADELPHIA with whom we have had many fine years of association, and with whom we enjoy a mutually prosperous relationship.

Throughout the years 1922 - 1957, Ciro Russo and Vito Caggiano Guided DIRIGO BOTTLING COMPANY to be a strong and formidable company, servicing all of their dealer accounts to the best of their ability and customer satisfaction, employing as many as thirty to forty personnel to do so.

Due to ill health, Ciro Russo was forced to retire, and therefore sold his share of the business to Vito Caggiano, who in turn operated the company until selling to his nephews Moses, Leonard, and Girard Russo, in the year 1959.

Under the leadership of these men the company has streamlined its operation. They liquidated their headquarters at 50 Union Street in Portland by selling to the Pels Company. The bottling division was put on the market and sold to the Harris Oil Company.

Our new and modern facilities are now located at 990 Congress Street Portland. Here railroad sidings have eliminated many of the problems facing the company in the past. We have been able to cut operational costs tremendously by this consolidation. We can now concentrate more vigorously on the brands of malt beverages we are connected with presently, and are in an excellent position to approach the leaders of the industry to offer an aggressive, energetic, well supervised representation in this area.

To add to the advantages of representation in this area, is the acquisition of a new fleet of vehicles to convey the merchandise throughout the territory. To give prestige and impetus to the deliveries our personnel have been fitted with new uniforms. We have one thought in mind to become the best, the largest, and the most efficient force in this section, and have taken many of

DIRIGO DISTRIBUTORS, Inc.
[illegible] CONGRESS STREET
PORTLAND, MAINE
[illegible]

the steps we believe are in the right direction. The first of which is making contact with the Falstaff Brewing Corporation.

Since we are seeking new products to distribute in this area, Cumberland and York counties, we have given great consideration to the need of expanding our present sales force, which at this time consists of a sales manager and four salesmen.

| | |
|---|---|
| Frank P. Mc Gough | Sales Manager |
| Leonard Russo | Salesman |
| Nick Russo | Salesman |
| Tony Russo | Salesman |
| Olfard Russo | Salesman |

The plan we have to cover the area is listed below:

1. All chain store offices would be contacted by the Sales Manager, to introduce new items, arrange promotional activity, obtain displays, and maintain harmonious relations.

2. Sales Manager will travel regularly with salesmen on a scheduled basis to insure salesmen's duties being performed properly, and to enable the sales manager to keep his fingers on the pulse of each territory.

3. Regularly planned contests would be given to the sales force. These would not embrace sales alone, but would include distribution and display of "point of sale" material as well.

4. Bonuses would be available to our drivers for being alert and capitalizing on an opportunity to display merchandise as well as furthering a sales effort.

We are aware of the position a distributor of our nature maintains in a market. Our entire investment is based on a progressive, energetic and alert sales program. It is our desire to have each member of our company family be a salesman. At present, we attempt to employ contests for all, based on the time available to each so that it will not interfere with his primary duties.

Valuable time has been utilized in practicing this type of ideal, however, we feel that the end results will give us a larger reward. Our personnel put different methods into effect to gain their goals, but as long as the ultimate end has been reached in a creditable fashion to both our customer and ourselves, then we are only too happy to reward the individual involved.

We have a happy organization that has proven it can successfully distribute and merchandise products to the satisfaction of the breweries, which we represent in Cumberland and York counties as

1 1C38

**DIRIGO DISTRIBUTORS, Inc.**
999 CONGRESS STREET
PORTLAND, MAINE

well as the satisfaction of ourselves. We are in a position to offer to the Falstaff Brewing Corporation all the facilities at our disposal to insure a good solid package sales promotion in this area.

The state of Maine, Vacationland, has a native population of approximately 982,000 the bulk of which resides in the southern part of the state. During the summer months, a constant influx of travelers swells the population fantastically. A prime example would be York county, 500,000 Canadians migrate into this area for their vacations. This, of course, does not include inhabitants from nearby and distant states of the Union. A total of five hundred "off premise" and one hundred twenty-five "on premise" accounts service the consumers living and vacationing in this area. We have the market for Falstaff products.

Some of the promotional and sales programs that we would employ are as follows:

1. Allocate $1,000 for announcing the initial break of Falstaff in this market.

2. Secure displays of Falstaff in all super markets in this area to coincide with the localized advertising.

3. Establish programs for outdoor signs, window neons, as well as point of sale placements.

4. Initiate programs with salesmen for distribution and displays of beer.

5. Set up incentive contests for the salesmen to achieve sales and promotional goals... on a continuous basis.

6. Compute quotas monthly for each sales territory.

7. Paint to your specifications at least two of our delivery trucks.

1 1039

April 23, 1935.

Mr. Leonard V. Harrop
Harrop Distributors, Incorporated
[illegible] Delaware Street
[illegible], Idaho

Dear Mr. Harrop:

Your recent letter of interest in Velocaff has been referred to me for further action.

We certainly appreciate your interest in Velocaff and wish to thank you for your recent letter.

At this time, we have no future development plans for the distribution of Velocaff in the state of Idaho. However, should these plans ever change, please be assured that you will be contacted with regard to the distribution of our product. We have filed your letter in our prospective distributor files for Idaho and again, our sincere thanks for your interest.

Very truly yours,

[illegible]

AL:mmmh
Sales Manager - Two Market Operations

Encs.

1 1035

United Distributors of Maine
68-82 WASHINGTON STREET
AUBURN - MAINE
Tel. 782-1141

Dec. 1, 1964

Falstaff Brewing Company
St. Louis, MO.

Gentlemen:

Read in todays issue of the Wall Street Journal your successful 1964 financial report.

Approximately two years ago we wrote and asked if you intended to come to the State of Maine with your brand. At this time you stated you had no such plans.

We now wonder, if your plans include distribution of your label at this time or in the foreseeable future, in the State of Maine.

Very truly yours
United Dist. of Maine
Alex J. Baumer

1 102

DEC 4 1964 A.M.

January 11, 1965

Mr. Alex J. Daumar
United Distributors of Maine
[illegible]-29 Washington Street
Auburn, Maine

Dear Mr. Daumar:

We certainly appreciate your recent letter of interest in distributing Falstaff in the Auburn, Maine marketing area.

Please be advised at this time we have no immediate plans for increasing our distribution within the state of Maine.

We have taken the liberty of filing your letter of interest in our prospective distributor file and should our plans change to include Maine in our marketing area, please be assured that you will certainly be contacted with regard to the distribution of Falstaff.

Again, many thanks for your interest.

Very best regards,

FALSTAFF BREWING CORPORATION

Al Sorenson
Sales Manager, New Market Operations

ms

1 1028

January 24, 1962

Mr. Charles W. Dependahl
Assistant General Sales Manager
Falstaff Brewery
5050 Oakland Avenue
St. Louis 10, Missouri

Dear Mr. Dependahl:

I was talking to my good friend, Red Hungate, one of your Sales Representatives, about the possibility of getting a Falstaff distributorship through the states of Maine, New Hampshire and Vermont. I understand through Mr. Hungate and through observation of my own there is no Falstaff as yet in this territory.

I would appreciate it very much if and when you increase your territory for Falstaff sales if you would let me know your requirements and if you would consider me in this distributorship. Any questions that you may want to know about me or any applications you may want me to fill out, please do not hesitate to send them to me.

Thanking you in advance for any consideration,
I am

Very truly yours,

August F. Lehman

August F. Lehman
1160 Clootha
St. Louis 16, Missouri
FR 2-9770
Bus. CE 1-3800 Sta. 720

1 1C6H

FEB 8

March 18, 1942

Mr. W. B. Preddy
Mundet Cork Corporation
11224 Candlelight Lane
Dallas 29, Texas

Dear Mr. Preddy:

Your office memorandum relative to the Coca Cola Bottling Company of Keene, New Hampshire being interested in a Falstaff Distributorship has been forwarded to our Sales Department for their review and handling.

I wish to take this opportunity of thanking you for referring this to Falstaff, and I am sure this distributor will hear from our Sales Department relative to same.

Thanks for your cooperation.

Yours very truly,

Warren J. Matthews
Director of Purchases

WJMmf

cc: Mr. Lee Harrison

1 1C66

BERLIN-GORHAM FRUIT & PRODUCE, INC.

Berlin, New Hampshire

Oct. 25, 1963

Falstaff Brewing Corp.
St. Louis, Mo.

Gentlemen:

For some years we have been worried with interest the progress and growth of Falstaff beer and hoped that its operation would reach New England.

With that in mind the writer, while in the beer wholesale business four years ago, wrote to your firm in an effort to make his dream come true. Your reply, through a Mr. Thibeault, was you were not then prepared to supply new markets. We sincerely hope this situation has been remedied.

Our current plans are centered in market coverage in northern New Hampshire and to build a new warehouse. We feel that the addition of a beer to our fruit and produce business would make these plans more sound.

We would welcome the opportunity of meeting with your representative to see if something can be worked out to destribute Falstaff beer in northern N. H.

Hoping for a favorable reply.

We remain,

Yours very truly

BERLIN-GORHAM FR. & PROD., INC.

Paul C. Comtois

Paul C. Comtois, Treas.

1 1963

October 20, 1964

Mr. Stanley Coury, Owner
Coury Wholesale, Inc.
20 Mt. Forist Street
Berlin, New Hampshire

Dear Mr. Coury:

It was certainly a pleasure visiting with you at the recent NENA Convention.

Please be assured that when Falstaff plans to include the New Hampshire marketing area in its distribution area you will certainly be contacted with regard to the distribution of our product.

Again, many thanks for your interest.

Very best regards,

FALSTAFF BREWING CORPORATION

Al Sorensen
Sales Manager, New Market Operations

ms

1 1064

MINDER CORK CORPORATION

MAR 12 1962

TO Mr Warren Matthews-Falstaff-St Louis, Mo

DATE 3/9/62

COPY TO Mr Rentmeis-

FROM W.B.Freddy

Falstaff Distributor
Keene, New Hampshire

Mr Jack Gurnsey-Coca Cola Bottling Company-Keene, New Hampshire is very much interested in a Falstaff Distributorship for his area.

I do not know what your plans are for this area but wanted you to have this information. Mr Gurnsey is well financed and I am sure would do a good job for you in that territory when you are ready for distribution there.

This is for your information

DATE
TO
FILE
SPECIAL

Best regards

W.B.Freddy

1 1067

Please Draft
for Mr. Hawthorne

March 20, 1962

Mr. Jack Curnsey
Coca Cola Bottling Company
Keene, New Hampshire

Dear Mr. Curnsey:

Mr. Freddy of Mandot Cork Corporation of Dallas, Texas contacted our Mr. Warren Matthews, Director of Purchasing, to acquaint him with your interest in the distribution of Falstaff beer in the New Hampshire area.

We want to take this opportunity to thank you for your interest, but must advise you that at this time Falstaff does not anticipate entering the New Hampshire area. We certainly appreciate having your name in our prospective distributor file and rest assured with a growing corporation like ours one of these days we will be in New Hampshire and will certainly contact you.

Thanks so much for writing us and with kindest regards we are

Sincerely,

FALSTAFF BREWING CORPORATION

Charles W. Dependahl
Assistant General Sales Manager

CWD:rgm
cc: Warren Matthews
W. B. Freddy

1 1065

GREYLOCK BEVERAGE CO., INC.
JESSE L. PARROTT, PRESIDENT
WHOLESALE AND RETAIL DEALERS IN
DOMESTIC AND FOREIGN
MALT BEVERAGES AND WINES
35 DEAN STREET
ADAMS, MASSACHUSETTS

June 17, 1960

Falstaff Brewing Corp.
5050 Oakland Avenue
St. Louis, Missouri

Dear Sirs:

We are interested in distributing Falstaff Beer in Berkshire County, Western Massachusettes. This territory extends from the Vermont to the Connecticut line and borders New York State.

Enclosed you will find a route book showing the area described, also the number of accounts.

At the present time we are distributing Genesee and Utica Club Ale & Beer. We feel that your product is what we need to compete the Premium Beers such as Bud, Schlitz, Pabst and Miller's.

If you are interested, an immediate reply would be appreciated.

Very truly yours,

Jesse L. Parrott, Pres.

JLP/wp

1 1061

JUN 20 A.M.

July 1, 1970

1 ICRD

George W. Greene, Inc.
WHOLESALE DISTRIBUTORS
BEER — WINE — TONIC
291 Washington Street
PEABODY, MASSACHUSETTS

October 28, 1960

Falstaff Brewing Corp.
Fort Wayne, Indiana.

Gentlemen:

We are very interested to know if you will come to the state of Massachusetts with your products. If so, we also would appreciate to have some details on the matter, and also prices.

We understand you have a fine product and like to have a sample of same.

Thank you kindly.

Yours truly,

George W. Greene, Inc.

Pres-Mgr. John A. Mozzarelli

JAM/cam

1 1959

"Happy Days"

November 1, 1960

Mr. John A. Mazzarelli
George W. Greene, Inc.
291 Washington Street
Franklin, Massachusetts

Dear Mr. Mazzarelli:

Thank you for your nice letter inquiring into the possibilities of obtaining the Falstaff brand for state of Massachusetts.

As all such determinations are made by our Marketing Department in St. Louis, I am forwarding your letter to Mr. Norman Thomas, New Business Manager, for consideration and handling.

Sincerely,
FALSTAFF BREWING CORPORATION

Edw. J. Griesedieck, Jr.
Plant General Manager

/lmm

cc: N. Thomas

1 1058

December 2, 1911

Mr. John ... Thornhill
... Building, Texas
... and Co.
... Texas

Dear Mr. Thornhill:

An inventory of the W. H. Orr stock of ... has been completed, your bottom of ... and we are ready to ship your ...

Our prices, for ... are ... and we feel sure that ... will be ... We ... to ... and ... to ... We ... to ... and ... to ... We ... to ... and ... to

William Lebow Company, Inc.
Representatives for Distillers and Importers
New Address: 251 Harvard Street, Brookline, Massachusetts

July 13, 1961

Falstaff Brewing Corporation
3617 Olive Street
St. Louis, Missouri

Attn: Sales Manager

Gentlemen:

Drawing on our twenty seven years of experience as brewery, winery, and distillery representatives we feel that the Falstaff Brewing Corporation could enjoy a large volume of business in Southern New England. While it is true that a full scale promotion with saturation advertising could produce optimum results our thinking would tend to run in the direction of a highly specialized no advertising campaign to produce great tonnage at little or no expense to the brewery.

Our firm is the oldest and most widely know brokerage firm in Southern New England. We have successfully represented such outstanding companies as the Park & Tilford Company, Cinzano Inc. and the James B. Beam Distilling Company. Currently, our clients include Florio Wines, Inc., Park Barnidge Company, Mahawk Liquor Corporation, Imported Brands, Atlas-Edelweiss Breweries and numerous others. In many cases we have shown our clients that our services have brought about increases in their volume of business by as much as ten fold.

We would be most happy to discuss the possibility of representing your company any time at your convenience. We feel sure that with your fine products and our fine contacts with every wholesale operation in Southern New England that a substantial amount of plus business could be directed to the Falstaff Brewing Corporation. And, if we may say so, at a far, far less cost to your company than any direct operation. Hoping to have the pleasure of serving you we remain

Very truly yours,

WILLIAM LEBOW & COMPANY

William Lebow

William Lebow
President

1 1051

Liquors · Whiskies · Cordials · Wines · Ales · Beer
ATLAS DISTRIBUTING CORP.
18 SHERMAN STREET · WORCESTER 3 · MASS.
TELEPHONE

July 20, 1961

Norman J. Thomas
Falstaff Brewing Corp.
5050 Oakland Ave.
St. Louis, Mo.

Dear Mr. Thomas:

I enjoyed very much our conversation on the phone regarding your product and the possibility of some future move into this area. As I said, I have watched the progress of your line with much interest.

This is to advise formally that I would like to be considered in any future move you may make in this direction and would appreciate your keeping this letter on file as evidence of this fact.

We would be pleased to furnish you with any data regarding our distributorship which may be helpful to you in getting a picture of our present operation.

Very truly yours,

ATLAS DISTRIBUTING CORP.

I. Josephs

IJ:EM

1 1040

Union Liquor Co.

TELEPHONE WYman 9-5655

744 ACUSHNET AVENUE NEW BEDFORD, MASSACHUSETTS

May 7, 1962

Sales Department
Falstaff Brewing Company
5050 Oakland Avenue
St. Louis, Missouri

Gentlemen:

We anticipate that in the near future the Falstaff line of beer will be available on the Eastern seaboard.

The Union Liquors Co. has been servicing the Southeastern Massachusetts market since 1936 and are interested in Falstaff.

Please advise when a meeting might be arranged to go into the matter in greater detail.

Sincerely yours,

UNION LIQUORS CO.

MELVIN [illegible]
President

ML:mma

1 1C5J

1 1052

Jul 25, 1958

Falstaff Brewing Corporation
Alvin Griesedieck Jr., Vice President & Director of Marketing
5050 Oakland Avenue
St. Louis 10, Missouri

Dear Sirs

I've been a small but enthusiastic stockholder of Falstaff for some years. About a year ago, I moved from Texas to New England. Needless to say, I've missed my Falstaff beer.

There is some expense, I know, in getting into new markets and finding new distributors. Since I've been in the Boston area I've met several people of substance who would be fine Falstaff distributors.

One gentleman has asked me to write you regarding your general plans to market Falstaff in New England and what your requirements are for distributors. He would be able to set up a fine distributorship in a very short time.

We look forward to hearing from you.

Sincerely,
Homer H. Cates Jr.
Homer H. Cates Jr.
127 Ocean Street
Lynn, Massachusetts

1 1049

1 1048

February 13, 1963

Mr. Al Sorenson, Sales Manager
Falstaff Brewing Corporation
New Market Operations
5050 Oakland Avenue
St. Louis, Missouri

Dear Mr. Sorenson:

I want to thank you for your July 25, 1962 letter in response to my letter to Mr. Alvin Griesedieck Jr. regarding a New England distributorship for Falstaff beer.

Your letter was very informative and courteous and I want to assure you at regular periods that I am still interested in the New England distributorship for Falstaff beer.

Since your letter, you have probably extended Falstaff into West Virginia and Virginia marketing areas; and if I know the marketing planning that Falstaff does, you are probably eyeing New England for sometime in 1963 or early in 1964.

An acknowledgment from you of this letter would be appreciated and any additional information you may have regarding Falstaff's marketing plans would certainly be appreciated.

Very sincerely yours,

Homer W. Cates

Homer W. Cates
221 Atlantic Avenue
Marblehead, Massachusetts

1 1041

FEB 18 AM

March 6, 1943

Mrs. [illegible] W. Gates
[illegible]
[illegible], Massachusetts

Dear Mrs. Gates:

I certainly appreciate your kind and [illegible] letter [illegible], Private's evacuation plans [illegible]

As at that time we had [illegible], although he [illegible] Base Hospital and [illegible], however, we have no [illegible] at the present time. [illegible] the Headquarters [illegible].

Again, please be assured that [illegible] and if [illegible], you will be [illegible] to the Commanding [illegible].

Very truly yours,

[illegible]

AL [illegible]
Adjutant - Port Medical [illegible]

Mimeo

1 1046

DAN AVERY ASSOCIATES SALES CO.

Tel. Co. No. 617-734-5265

July 15, 1963

Mr. Stanley L. Kyczalski
General Sales Manager
Falstaff Brewing Corporation
1965 Shenandoah Avenue,
St. Louis 4, Missouri

Dear Mr. Kyczalski:

Having learned of your promotion to General Sales Manager for the Falstaff Brewing Corporation, upon the retirement of Bruce Alston, I should like to take this opportunity to congratulate you, and wish all the success in your new position as General Sales Manager.

For years I have been making contact with the officials and management of your brewery, trying to sell them the idea to advertise the New England States areas, but their answer has been, "we are just not ready to ship as far to the New England States."

Should your plans change, regarding new markets, and especially the New England States and the brewery is ready to ship, we would be very much interested to discuss our market, where for years we have sold to the distributors here.

Would appreciate to have you give us your utmost consideration.

We do feel that the New England market is ready for Falstaff Beer, and would accept your products most graciously.

We also feel that the consumers in this area are about ready for a change in products, try it be Schlitz, Bud, or any other nationally advertised brew, that is now serving New England. For years some of my distributors that did not have a national brewery representation, were after me to try and get you interested to come into the market. We believe the time is ripe and would suggest that this should be given you utmost consideration.

Looking forward to hear from you. Thank you.

1 1042

Sincerely yours,
DAN AVERY ASSOCIATES SALES CO., INC.
D. F. Avery Jr.
D. F. Avery Jr.

dfa:jf/cm

JUL 23 1963

July 26, 1963

Mr. D. D. Avery, Jr.
Don Avery Associates Sales Co.
One Ninety Four South Main Street
Sharon, Massachusetts

Dear Mr. Avery:

Thank you for your letter of July 15.

As of this writing, we know nothing definite regarding our future plans for the New England area. We are turning your letter over to Al Sorenson, our Manager of New Market Operations, who will contact you if something should develop which he thinks might be of interest to you.

We appreciate your writing and hope you will continue your interest in Falstaff.

Sincerely,

FALSTAFF BREWING CORPORATION

Charles E. Dopenthal
General Sales Manager

CED:ms

CC: Mr. Al Sorenson

1 1041

9

66 Connell Street
Quincy 69, Mass.
773 - 6150

September 15, 1964

SEP 18 1964 A.M.

Falstaff Brewing Corp.
5050 Oakland Ave.
St. Louis, Missouri

Att: Mr. R. B. Wightman
(General Sales Manager)

Dear Sir:

Due to Market conditions the Haffenreffer Brewery, will cease operations on October 1st.

There has been many rumors in this area that you people may enter the New England market one day. After October 1st there will be 14 Beer Salesmen and myself looking for work.

This sales group covers direct some 1000 Package Stores and 900 pouring spots. Could this be the time for your move?

At any rate I have attached my resume in case there maybe something I can do for Falstaff.

Sincerely yours,

John R. Manning

John R. Manning

1 1055

September 14, 1964

John R. Manning
64 Connell Street
Quincy 69, Mass.
773 - 6150

47 Years old
Married - two children
Own a car and home
Veteran - (Captain U.S.A.)

Arlington High School
Boston University (1 year)
State Extention Courses in Salesmanship
English and Public Speaking
Business Administration, Special Course,
Harvard University
Jack Lacey's Sales Course
Dale Carnegie Course

1951 - 1964 HAFFENREFFER & COMPANY - BOSTON
Draught Salesman
Package Store Salesman

Presently Assistant Sales Manager (Package Store Division) being responsible for Sales, Distribution and Merchandising in some 1000 retail outlets in Metropolitan Boston.

1950 - 1951 SOUTHERN BISCUIT COMPANY - BOSTON AREA
Sales Supervisor

1936 - 1950 LEVER BROTHERS COMPANY - CAMBRIDGE & NEW YORK
Messenger
Store Displays
Retail Salesman
Dealer Promotions
Co-operative Advertising
Department Head - Merchandising Payments

There must be a spot for me in your organization. Can we talk it over?

John R. Manning

1 1C56

October 12, 1954

Mr. John R. Manning
Whittemore & Co., Inc.
Granite Plain
Boston 10, Massachusetts

Dear Mr. Manning:

Your recent letter to Falstaff Brewing Corporation has been forwarded to me for further action.

At this time, Falstaff does not have any immediate plans for marketing our product in the New England marketing area.

We have taken the liberty of filing your letter in our prospective distributor file and please be assured that when our plans are changed to include the Boston, Massachusetts marketing area in our area of distribution, you will certainly be contacted with regard to the distribution of Falstaff.

Again, many thanks for your interest.

Very best regards,

FALSTAFF BREWING CORPORATION

Al Sorenson
Sales Manager - New Market Operations

AS:mm

1 1954

October 20, 1954

Mr. George S. Malby
National Beer & Liquor Company
128 Essex Street
Haverhill, Massachusetts

Dear Mr. Malby:

It was certainly a pleasure meeting and visiting with you during the recent NBWA Convention.

Please be assured that when Falstaff plans to further expand its marketing area to include Massachusetts you will certainly be contacted with regard to the distribution of our product.

Again, many thanks for your interest.

Very best regards,

FALSTAFF BREWING CORPORATION

Al Sorenson
Sales Manager, New Market Operations

ms

1 1002

March 24, 1965

Mr. Al Sorenson
Sales Manager-New Market Operations
Falstaff Brewing Corporation
5050 Oakland Avenue
St. Louis, Missouri 63110

Dear Mr. Sorenson:

The last letter I had from you (March 8, 1965) indicated that you would contact me with regard to the distribution of Falstaff when you made the move into the New England market.

As a transplanted Texan, satisfied small stockholder, and thirsty Falstaff admirer, I was happy to get the letter of Messrs. Griesedieck and Bagby of March 15, 1965. I still have ambitions of being the Falstaff Distributor in Massachusetts.

Since the acquisition of Narragansett seems paramount, I would like to know the specific qualifications you require of a distributor. I'm sure there are some things which must be done on my part to meet your acceptance.

With regard to this new turn of events, I would appreciate hearing from you at your earliest convenience.

Sincerely,

Homer W. Cates, Jr.

Homer W. Cates, Jr.

1 1C45

MAR 26 1965

March 31, 1965

Mr. Homer W. Cates, Jr.
221 Atlantic Avenue
Marblehead, Massachusetts

Dear Mr. Cates:

Thanks very much for your letter of March 24, 1965. It was very nice hearing from you.

In recent months Mr. Sorenson has left the employ of Falstaff to pursue other lines of endeavor and I have been given the assignment of working in New Markets.

I noticed through the Massachusetts prospective file that you and Mr. Sorenson have had some previous correspondence and we would again like to express to you our appreciation of your continued interest in Falstaff. As mentioned in Mr. Sorenson's previous letter to you in 1963, we have extended our distribution area into the East but have not swung into the Northeastern section of the United States as yet. I am not in a position at this time to comment as to how the acquisition of Narragansett Brewery in Cranston, Rhode Island will affect the distribution of Falstaff in your section of the country, Mr. Cates

I do want to assure you, however, as did Mr. Sorenson, that your letter will be kept on file and that you will be given every consideration when we do accomplish survey work in Massachusetts.

1 1043

Mr. Homer W. Cates, Jr.
Marblehead, Massachusetts

March 31, 1964
Page 2

I do think, however, that I can throw some light on the general qualifications we seek when appointing a distributor in a new area. Ideally, we attempt to align ourselves with a wholesaler who is already in business and who possesses the necessary facilities for operating a distributorship such as the warehouse, trucks, personnel, etc.

This is not an absolute must; however it is the basic qualification which we seek. Somehow I got the impression from your letter that you are not now a beer wholesaler, but this would not definitely preclude you from consideration by our Company.

Mr. Cates, again thanks very much for your letter of inquiry. It is most gratifying when interest in our product is expressed such as has been the case with you.

When we do come to Massachusetts someone from Falstaff will definitely contact you.

Very truly yours,

FALSTAFF BREWING CORPORATION

Larry Dallas
Sales Manager, New Market Operations

ms

1 1044

83 Donna Road
Holliston, Mass.
April 22, 1965

Falstaff Brewing Corporation
5050 Oakland Street
St. Louis, Missouri

Gentlemen:

During a business trip to Columbus, Ohio I had occasion to talk with one of your salesmen. During the conversation I received the impression that Falstaff is in the process of expanding its sales territory to become a national beer.

If the impression I have is correct, I would be interested in a Distributorship for the New England States or possibly any one of these states.

At the present time, I am not a distributor and am not sure of all obligations incurred by a Distributorship Franchise. However, if you are interested, I would appreciate an opportunity to review and evaluate a proposed Distributorship Franchise. If an evaluation of such a proposed Franchise proves favorable, I am confident that satisfactory financing can be arranged.

I look forward to your response with interest.

Very truly yours,

Paul E. Craig

1 10:00

APR 26 1965 P.M.

SEAL SODA COMPANY, Inc.
SOUTH BARRE, VERMONT

May 11, 1960

Falstaff Brewing Corp.
3617 Olive St.
St. Louis, Missouri

Gentlemen:

We understand that there is a possibility of your company distributing your products in this area and, if so, we would be very much interested in being one of your distributors.

We would be pleased to send you information about our company if you would desire, and certainly would welcome the opportunity to sit down with a representative from your company to discuss this. Thanking you for your courtesy, I am

Yours truly,

SEAL SODA CO., INC.
Guelfo Bertolini, Pres.

GBe

1 1352

# STATE DISTRIBUTING CO. INC.

WOODSTOCK AVENUE PHONE 775-9169 RUTLAND, VERMONT

January 15, 1963

Mr. R. B. Wightman
General Sales Manager
Falstaff Brewing Corp.
5050 Oakland Avenue
St. Louis, Missouri

Dear Sir:

We would like to take this opportunity to ask that you contact us, if at any time in the future you extend your operation into Vermont.

Very truly yours,
STATE DISTRIBUTING CO., INC.
By Burton R Morse
Burton R. Morse
Secretary

BRM:ej

1 135F

America's Oldest Lager Beer · Established 1842

JAN 17 P.M.

Swanton, Vermont
July 12, 1965

Falstaff Brewing Corporation
St. Louis, Missouri

Gentlemen:

We are at the present time engaged in a program of expansion which includes the acquisition of a beer distributorship, and after a thorough study of our area which included franchises now in operation and franchises available, have decided to contact you with regard to the possibility of a distributorship for your products in Vermont.

We are a soda bottling works and distributorship located in Swanton, Vt., operating as a partnership under the trade name of Monarch Bottling Works, and owned by Wesley Menard and Maurice Menard, both of whom are active in the business. Monaren Bottling Works was founded by David Menard, father of the present owners, in 1930, and was acquired by them upon his retirement in 1962. Four delivery trucks are used in the operation, serving three counties.

Under the management of David Menard beer was distributed from 1935 until 1948, at which time it was discontinued. However, due to an increase in our present business, which includes Monarch Sodas, Hires Root Beer, and Mesbitt's Soda, we feel that advance sales are now required for the various routes, and are in fact already taking advance sales on some routes. Because of existing laws in the State Of Vermont, advance sales are required for beer distributorships, and it is our thought to combine advance sales for beer and soda throughout the area.

We would appreciate hearing from you concerning this matter, and would welcome an opportunity to discuss it with your representative at his convenience.

Very truly yours,

Wesley O. Menard
Monarch Bottling Works
Swanton, Vermont

WOM/re

1 1354

October 18, 1953

Mr. Wesley O. Menard
Menard Bottling Works
Swanton,
Vermont

Dear Mr. Menard:

Please excuse our belated answer to your last letter of inquiry with regard to distributing Falstaff Beer in your Swanton, Vermont marketing area. This letter has been forwarded to us for further action.

At this time we do not have any plans for the distribution of Falstaff in your Vermont marketing area. We have taken the liberty of filing your letter in our prospective distributor file for Vermont and should we have any change in our marketing plans, please be assured that you will be contacted with regard to the distribution of Falstaff.

Very best regards,

FALSTAFF BREWING CORPORATION

Al Sorenson
Sales Manager - Non-Market Operations

AS:eag

1 1353

Forecasts of the national economy indicate that there will be opportunity for expansion of business but that severe competition can be expected to prevail.

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**FALSTAFF MUST GROW**

This report counsels Falstaff to plan for and to seek growth. Yet growth is not taken as a desirable objective in itself. Why, therefore, should Falstaff grow? It is believed that growth offers Falstaff several advantages which make expanded size desirable. To achieve these benefits will require expanded operation. Among the reasons for seeking growth are the following:

1. Falstaff makes its most attractive return from markets which it penetrates to a substantial degree. Other things being equal, Falstaff should therefore seek greater penetration in the areas that it now serves and where its percentage of the market is less than 10 percent. To do so will require growth.

2. Falstaff does not now sell in the largest beer market of the country, the northeast quarter of the United States, which consumes three-quarters of the beer sold in the country. (See Figure 1.) To secure the larger profit ratios of branch sales and distributorships in major centers of popu-

2. Falstaff does not now sell in the largest beer market lation, profits not here. Falstaff should sell to the enlarging and concentrated markets provided by the large metropolitan areas and the developing "inter-urbias" of the country. These are now largely outside Falstaff territory. To reach them Falstaff must grow.

3. To provide the larger volume needed to serve its existing markets more intensively, as well as to satisfy the proposed new markets, Falstaff will have to grow in productive capacity.

4. Falstaff should, where possible, serve its concentrated markets directly through branches in the effort to obtain the higher returns now experienced by Falstaff in New Orleans, San Jose and St. Louis. This will require growth in both productive and sales organization.

5. Increased penetration in both its existing and new markets will be expensive, but it will provide a wider base

for absorbing costs. This, in turn, will lower cost ratios per unit of product and hence increase profitability.

6. A larger volume of operations will help to support the increased research, development, engineering, planning and budget programs recommended.

7. Larger operations will provide increased opportunity for profitable investment.

8. More extensive and perhaps new forms of operation will provide increased challenge and opportunity to Falstaff management and personnel.

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6. Falstaff seeks to enlist personnel of outstanding qualifications and to give them opportunities to develop themselves and to engage in both company and civic activities of increased scope and responsibility.

## THE FALSTAFF MARKET

To continue Falstaff's striking success during the past ten years, and to secure the remaining untapped large market Falstaff will concentrate its attention and effort for the next three to five years in the field of brewing and sale of beer. Moreover, for some years expansion of Falstaff will be achieved primarily (although perhaps not exclusively) by the promotion of its own brand or brands rather than by acquisition through purchase of other brands. This plan of action is based on the uncertainty regarding anti-trust action should Falstaff endeavor to acquire significant going concerns as part of the effort to expand. Clearly, however, whenever Falstaff objectives can be advanced by acquisition, merger, or cooperation with other breweries, Falstaff should investigate these possibilities with the intention of acting in its own interest.

Falstaff should thoroughly study the advantages and drawbacks of premium priced brands to determine their utility to Falstaff and the means by which Falstaff could secure such benefits as they can offer. Included in such studies should be an investigation into consumer reaction to two differently priced products produced by the same company and distributed by the same sales organization. However, any growth, whether through a popular prices item or otherwise, is basically dependent upon the market for beer. Profitability is dependent on volume. Accordingly,

this section is concerned with a summary analysis of the beer market with particular reference to Falstaff's ability to participate in it. For greater detail, see "Recommendations for Marketing Action," in Part III of this report.

It is well known that since 1945 the total volume of beer sold in the United States has remained essentially static at a level of approximately 85 million barrels per year. On the other hand, during this period Falstaff sales have risen from 1,337,761 to 4,501,933 barrels. It is evident that Falstaff has demonstrated the ability to secure a larger share of the existing market. This Falstaff has done in the central, southern and western areas of the country. However, these areas are responsible for only approximately one-fourth of the beer consumed. Performance to date justifies the belief that Falstaff could increase its sales by invasion of the northeastern market On the other hand, Falstaff's costs have been increasing, resulting in declining profitability. It is necessary to be careful, therefore, in considering what the future markets and prospects of profit might be for expanded Falstaff operation.

The U.S. population is increasing and, through increase in numbers in the beer drinking ages, will in time afford a larger market. This is so despite the down-trend in per capita beer drinking, which is so slight that with population growth the industry can look forward to increased sales. However, as stated before, Falstaff's sales increases since 1945 have shown that the company can capture increased shares of the existing market even in a period of no market growth. Falstaff's own prediction suggests that its sales will nearly double in its present markets by 1975. However, as stated before, Falstaff does not now serve the greater part of the major beer markets of the central and northeastern U.S. Seventy-three percent of the beer consumed in the U.S. is drunk in these regions. Moreover, eighty percent of consumption in these areas takes place in metropolitan centers of population. Falstaff's success in securing volume sales in the face of competition indicates that Falstaff should be able to win acceptance in these areas. Since costs of sales and delivery are lowest when incurred in connection with serving concentrated markets, these areas should afford Falstaff areas for profitable expansion. Therefore, to achieve growth with profit, Falstaff should seek to establish new markets in major metropoli-

tan areas like Detroit, Chicago, Cleveland, Philadelphia and New York. Furthermore, as discussed in Part III under "Comparison of Branch and Distributor Sales," to the extent feasible, Falstaff should operate in these areas through direct selling and delivering branches, with the attendant higher margin of profit.

The size of the market in the northeastern area of the United States can be seen in Figure 1. It will be noted that four types of data are included in a box for each state, with the information always in the order shown in the legend on the map. Of particular pertinence is the second (blue) figure, which shows the 1959 consumption in each state in millions of barrels. If these data are analyzed, it is seen that three-fourths of all beer purchased in the United States is consumed in the northeastern area. This is relevant to Falstaff's planning for growth in the future, particularly because of the advantages in reaching concentrated markets with efficiency.

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Moreover, it should be noted, population is increasing in suburban areas around existing metropolitan centers. Accordingly, new "inter-urbias" or growth areas are arising around, as well as creating, concentrations of population such as exist around New York City, Philadelphia, Cleveland, Detroit, Chicago and Los Angeles. These overlapping or contiguous large areas have special marketing significance, since it is these concentrations of population which also possess the ability to buy. For Falstaff these markets can provide volume of sales, economies in deliveries, and efficiency in advertising and selling through the relative ease of moving into contiguous areas, especially those which may be adjacent to areas already served by Falstaff. These large markets will also require and can support new, efficient production or packaging plants situated so as to serve these areas efficiently. It must be recognized, however, that these advantages pose equal opportunity for Falstaff's competitors, including local and regional brewers as well as national brands, all of whom require broader coverage to meet rising costs.

Although opportunities exist to increase beer sales beyond the straight-line projections which have served as estimates, there are many problems that will threaten profits.

Generally speaking, we believe intensive price competition will persist. Moreover, labor rates will undoubtedly continue upward. Taxes, which are out of the control of the brewer, will continue to increase, placing added pressure on profitability. Container prices, which are already high, will rise, and ways must be found to reduce these costs. Raw materials and utilities, while not a large percent of the total cost of goods, will also rise. Marketing costs, a large item, will continue to increase as competition increases. Advertising outlays in particular will rise. Thus, larger sales volumes will be required in each market in order to reduce these costs on a per barrel basis and permit improved profitability.

* * * * *

## ORDER OF SALES EXPANSION

From what has been said with respect to future markets, it is evident that Falstaff's sales effort should be planned to achieve deeper penetration of existing markets and also to reach into the new areas of concentration of population. In general, greater penetration of existing markets is needed where penetration is less than 10 percent, to improve the profitability of sales in those areas. Additionally, Falstaff must reach the centers of population that it does not now serve. Not to do so would be to omit too large a portion of the total market. Moreover, the concentrated market groupings proposed should permit efficient selling and distribution, with resulting higher profitability.

Experience has shown that Falstaff secures easier entry into a market if the new territory is contiguous to areas where Falstaff is already sold. Presumably this comes about from spill-over of advertising effect and by word of mouth reputation. Likewise, advertising and sales effort devoted to contiguous new territory can be expected to have beneficial effects in the existing adjacent Falstaff markets. In order to have these benefits both in new areas and in existing territory, it is suggested that Falstaff in the next six years should extend its sales coverage basically in the following order:

1. Intensify marketing effort in its present areas where penetration is below a level of satisfactory profitability (10%).

2. Investigate and correct the California loss operation, starting immediately.
3. Enter Detroit in the spring of 1961.
4. Enter Chicago in the spring of 1962.
5. Enter the East Coast and Southeast Florida areas in the spring of 1965.

In entering new areas, Falstaff will have the opportunity to decide whether to do so through branch operations or through distributorships. Falstaff's experience has indicated that its sales are most profitable where they are made through Falstaff branches. The profitability of branches in larger centers of population is especially noticeable. Whether this is due to more efficient selling or advertising effort, the price differential to Falstaff from branch sales, or the reduction in transportation costs with shorter delivery distances must be investigated further. It suggests, however, that Falstaff should arrange to sell to the new concentrations of population through branch operations supported by production or packaging plants convenient to them. As will be noted below, it is proposed that in some instances, if justified as the result of more detailed analysis, service to a major market area can be begun by means of a local packaging plant prior to or independent of the establishment of a productive plant in that area.

As stated before in connection with marketing, it would appear that an increased volume of beer will be sold to housewives for use in the home. To derive the most benefit from this type of purchase, Falstaff's sales effort should be increasingly addressed to the housewife and to the desire to participate in and enrich the experiences of family living and informal sociability. It would seem desirable that sales appeal through advertising, counter displays, packaging and otherwise should be directed to this market in addition to other general themes of promotion.

If Falstaff moves in the direction of products for ages below 20 or above 49 or older, appropriate sales programs will be required for this purpose.

## PRODUCTIVE CAPACITY

If Falstaff is to participate in the increased markets of the future, and do so most effectively, it is clear that Falstaff will require increased productive capacity. This brewing and packaging capacity will be required to serve ex-

panded sales in existing Falstaff territory and also to service new areas of advance. Regardless of how rapidly moves are made to expand its sales territory, it is essential that the marketing and sales effort be supported by productive capacity adequate to provide the required quantity and quality of product at suitable cost.

Preliminary engineering studies have shown that new productive capacity can be created *by application of established principles of design and existing types of equipment which would provide Falstaff with plants of significantly reduced cost, both in initial investment and in operating expenses.* This would favor new construction, except where Falstaff is fortunate enough to be able to purchase facilities at extraordinarily low prices and located in the desired areas.

In a sense, it is fortunate that Falstaff's existing capacity is so close to its requirements that substantially all increases in sales will require new productive capacity; this will give Falstaff the immediate advantage of obtaining added capacity at the lowest possible capital and operating costs available from progressive engineering. Recommendations for future brewing and bottling facilities are given in Part III of this report. While revisions of process and equipment are applicable to new plants, it must not be overlooked that the same principles and equipment are useful to existing installations. Accordingly, Falstaff should review its existing production plants to see where replacement upon obsolescence (or earlier), modification of process, or revision or substitution of equipment could secure added output at favorable costs. To the extent considered necessary, pilot or exploratory testing of innovations in process or equipment should be undertaken immediately, so that the results will be available for use in plant expansion or new plant construction at the earliest possible time.

To match the requirements of expanding sales at favorable costs for the respective market locations, it is proposed that new brewing plants be established and old plants expanded or acquired in the areas named in the following section.

### TABLE OF PLANTS AND SCHEDULE

1. Expand Galveston production by adding brewing facilities to produce at an annual rate of 1 million barrels.

This addition to Falstaff capacity should come into production in early 1961.

2. Build a new plant in Southern California and another in Michigan at or near Detroit, both to come into production in early 1963. These plants are to be sized for 500,000 bbl annual output on one-shift operation. However, if current figures show more capacity is needed by the time construction starts, make the necessary capital additions to operate the same plants on additional shifts.

On the basis of engineering analysis and actual experimental data, determine if Detroit should be tripled in size and Fort Wayne vacated instead of modernized.

3. Start construction of an East Coast plant—probably near Baltimore—sized like those in Southern California and Detroit, to come into production early in 1965.

Note that, except under special circumstances, all of the facilities proposed are new rather than rehabilitated old breweries. The reasons for this suggestion are discussed in Part III in the section referred to above.

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The projected population growth by states reveals that Falstaff's present marketing area includes within its boundaries all but four of the fastest growing states[1], eight of the thirteen slowest growing states[2], and ten of the intermediate growth states[3]. Evidence of Falstaff's general performance indicates that its share of the market is increasing in all of the states with rapidly increasing populations, with the exception of Florida, where internal population growth is perhaps not as important as migration (usually of older people) for its projected large increase. Among the slowest growing states, Falstaff's share of the market in the past few years shows a marked increase in only one, Alabama, where the industry as a whole manifested an increase in sales. In the other slow-growth states, Falstaff appears to be holding its own, under a rather static

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[1] Included at present are California, Nevada, Arizona, New Mexico, Colorado and Florida, but not Oregon, Delaware, Maryland and Utah.

[2] Included are South Dakota, Nebraska, Iowa, Oklahoma, Arkansas, Mississippi, Alabama and Kentucky, but not Maine, Vermont, North Dakota, West Virginia and Rhode Island.

[3] Wyoming, Kansas, Missouri, Illinois, Indiana, Tennessee, Ohio, Georgia, Texas and Louisiana.

set of conditions. In the intermediate-growth states, Falstaff is moving ahead in five and holding its own in five.

On the basis of the foregoing, it appears that Falstaff's future sales volume will depend on the extent to which it can exploit the market potential of the rapid and intermediate-growth states. We do not know to what extent the population characteristics of the fast-growing states will affect beer consumption; however, we believe that it will be favorable, since much of this growth is taking place in traditionally good beer markets. These form a continuous belt from the Pacific to the Atlantic coasts, with a spur composed of Texas and Louisiana to the South. Touching the boundaries of Falstaff's present market, the Northwest may present a potential future market characterized by a rapidly expanding, markedly youthful population and intense urbanization.

## ANALYSIS OF INDUSTRY CHANGES

A virtual stagnation of beer sales volume since 1948 in the face of rising costs has created conditions most responsible for the changes which have occurred in the brewing industry in recent years. The inability of the industry to increase sales has resulted in highly competitive situation which has generally held retail beer prices down. Certainly, prices have not risen commensurate with costs. Consequently, many local and regional brewers have been forced out of business. The intensified scramble for the consumers' beer business has resulted in greatly increased advertising expenditures by brewers. As this competition increased, greater sales volume has been required to meet rising costs and to provide maximum profits. Thus, a series of mergers has occurred, and many new markets have been developed by the nation's leading breweries to find the required additional sales volume.

The same conditions that have influenced the industry for the last ten years will, we believe, set the climate for brewing operations between 1960 and 1970. Although population increases will occur and sales will probably rise in at least direct proportion to these increases, we do not foresee a lessening of the intensity of price competition. We believe that much of the recent expansion and modernization in the industry was based on the expectation of larger markets during the 1960's. In other words, brewers will

need larger sales to justify their investments. Moreover, it is expected that costs will continue to rise. Certainly, marketing costs—particularly advertising—will continue to rise as competition increases. Materials and labor costs show no likelihood of decreasing. In the light of these observations and certain sociological and economic changes noted above, several considerations should be made in Falstaff's forward planning. These are discussed below.

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## RECOMMENDATIONS FOR MARKETING ACTION

On the basis of the analyses above and various Falstaff reports, we developed specific recommendations for action which we believe Falstaff should take in its marketing programs between 1960 and 1970. Broadly, these recommendations are of three kinds: First, we have made recommendations concerning the focus of marketing effort within existing markets. Secondly, we have made recommendations concerning market expansion. Finally, we have made recommendations concerning product strategy and other aspects of future Falstaff marketing programs.

1. *Falstaff should expand its market coverage into the northeastern region of the United States, Chicago and Detroit in order to tap the major American beer markets.*

According to an analysis of the *Life Study of Consumer Expenditures* (see "Analysis of Beer Consumption" in Part III), 73 percent of the total United States expenditures for beer and ale are made in the northern and central states areas of the United States. These regions contain only 57 percent of all United States households, although 73 percent of all expenditures for beer and ale are made there. In other words, beer and ale expenditures per household in this area are much higher than in other sections of the country, thus indicating a more dense and potentially productive area than many Falstaff presently serves.

Figure 3 shows the extent to which Falstaff's present market areas miss regions of large sales potential. On this map, the shaded portions, which represent Falstaff's sales territories, are superimposed on the metropolitan areas of Figure 2.

We recognize that Falstaff enjoys a dominant position in

a number of states in the central region. Major markets within this region to which it might expand are the states of Minnesota, Wisconsin, and the cities of Chicago and Detroit. Because of the very intensive competition in the states of Minnesota and Wisconsin and the comparative ease with which the company could expand into other areas, we do not recommend consideration of expansion into these states in the immediate future. On the other hand, we do believe that the cities of Detroit and Chicago should be entered very soon. Further, entry into the northeast region should likewise be undertaken in the next ten years if Falstaff is to achieve national coverage and attain a dominant position in the national market.

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3. *Within existing markets, Falstaff should give top priority to the improvement of the California market.*

California is the fastest growing state in the United States; it is estimated that Los Angeles will soon become the largest city in America. Yet, California is a state where Falstaff lost about $340,000 in 1958, even though the company had been in this market for 5 years in the northern and 2½ years in the southern sections of the state. Clearly, therefore, on the basis of this state's long-range potential and the magnitude of present losses, we recommend that every effort be expended to improve Falstaff's position in this market. Moreover, we believe precedence and priority should be given to programs aimed at improving this market over others that might be applied elsewhere, even to opening new markets. In particular, we recommend that Southern California should receive maximum attention. The warm climate, the young population, and casual, outdoor living are but three examples of characteristics of this market which favor beer consumption. Moreover, Falstaff should use this opportunity to develop the most effective programs for entering difficult urban markets. Until this market is more highly developed, we do not recommend expansion into the Northwestern markets of Oregon and Washington.

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*4. Falstaff should enter the Chicago market as its next new market entry.*

As noted above, we recommend that Falstaff enter the Chicago market in the near future to increase its sales volume and profits. Barring some unusual development, such as a highly favorable opportunity to purchase a brewery in another market, we recommend that expansion into this city should be Falstaff's next new market. This recommendation is based on several considerations. First, a projected rate of growth and profitability of entry into Chicago prepared by Falstaff's marketing department in 1957 showed that the Chicago market would quickly return a rapidly increasing profit. This was true whether Falstaff entered that market through distributors or a branch operation. Specifically, in a distributor operation, selling at an "in-between" price, it was expected that Chicago would return a profit from operations of 49 cents per barrel at the end of the first year, $2.64 at the end of two years, and $5.95 at the end of three. Entering the market through branch operations at the same price will return 39 cents at the end of the first year, $4.81 at the end of two years, and $9.61 at the end of three years. Thus, a second reason for recommending entry into Chicago is that Falstaff can establish the more profitable branch operation. Other aspects of our study will show that the branch operation is the most profitable form of distribution for Falstaff. In addition to their profitability, there are advantages of control which Falstaff will have over marketing operations that are not possible with a distributor. Thus, a more effective and immediate benefit can be realized, in our opinion, by establishing Falstaff in a new, difficult market like Chicago.

It is recognized that there are a number of brands competing very intensively for a share of the Chicago market. This competition is formidable, and it will require a very intensive program on Falstaff's part to meet it. However, we believe that entry into this market, which is shared by a greater number and in which one brand does not have major dominance, will be easier than fighting one or two dominant brands. The potential market in Chicago is sufficiently large, that a comparatively small share, such as a 10 percent, would be not only sizable in terms of barrels sold but highly profitable as well.

We realize that Chicago has not been a good market for popular price beer. This is a curious phenomenon, and Falstaff should not ignore it. Rather, some price increase should undoubtedly be made. Since Falstaff has been featured as a premium quality product, we do not foresee problems in consumer acceptance at a higher price. However, a price increase may create problems at the periphery of this market, where the prices in surrounding areas will be lower. Other brands have met this problem by setting an in-between price. Since the precedent has been established and is apparently successful, we recommend that Falstaff do the same. In any event, this consideration does not preclude entry into this market.

5. *Falstaff should enter the Detroit market.*

Under present conditions we believe entry into the Detroit market will take longer, will cost more, and will return less profit per barrel in its beginning years than would the Chicago market. Therefore, we recommend that this market be exploited after Chicago. We do recognize, however, that circumstances may arise which would favor expansion into Detroit before Chicago. For example, the availability of a brewery or a baseball team there might make this desirable, and we would agree that such considerations should change the sequence of market entry. In the absence of such controlling circumstances, the exact date of entry will be determined by the availability of cash and is discussed elsewhere in our study. Unlike Chicago, Falstaff will have to set up distributors in this state rather than branches unless legal maneuvers are possible which would permit branch operations. Certainly, this should be explored. As in Chicago, competition in Detroit is formidable and intensive. Unlike Chicago, the dominant share of the market is owned by three brands. It appears that Stroh, the largest of these, is declining slightly. This could provide Falstaff with a unique opportunity for market entry such as had been done in developing other areas in the past.

6. *Within the near future, Falstaff should expand its coverage in Florida to the East Coast of the state.*

At the present time, Falstaff has only a 3.4 percent

share of the market in Florida. On the other hand, Falstaff's coverage is only half of the state and does not include some of the larger cities such as Miami on the eastern coast. Moreover, the Florida operation is currently losing money, even though it is a high-potential area with long-term growth prospects. In the light of these conditions, we believe expansion should be made into this area as soon as practical.

*7. Within five years, assuming continued growth and profitability in existing territories, we believe Falstaff should expand into the Eastern Coastal market. It probably should locate a new brewery in the Baltimore area.*

The objective behind this recommendation is to establish Falstaff in the Northeast by locating in the eastern coastal area from Boston to Washington, D. C. In recommending establishment in this market in Baltimore, we are recommending leaping across without entering large areas to the east and north of Falstaff's presents markets. Although experience has shown that moving into contiguous areas facilitiates market entry, we are recommending entering this market by jumping across smaller, in-between markets. Our reasons for this are primarily based on time considerations. The ultimate objective for Falstaff's marketing expansion is entry into Philadelphia and New York. We believe that this can best be achieved by either moving into a market north of New York or south of Philadelphia and then expanding into these metropolitan areas. We do not feel that it is desirable to move into these areas by moving through Ohio and New York State, or up from the South through North Carolina and Virginia. Such strategy would take a considerable period of time. Moreover, we believe by the time entry into this market was effected, competition would be substantially strengthened by the expansion of regional beers out of New York and by others, like Carling, who are capitalizing on the interurban development taking place along the coast. On the other hand, we feel the interurban development will assist in establishing a new brand, and we believe Falstaff can take advantage of this if it enters this area in five years.

We recognize that moving into this area will require the building or purchase of a brewery. This market cannot be

supplied competitively from any existing plants. Obviously, this will add to the investment required to enter the market.

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## COMPARISON OF BRANCH AND DISTRIBUTOR SALES

### Selection of Sales Outlets

An examination of the profitability of Falstaff sales shows quite clearly that branch operations are more profitable than sales to distributors. In 1958, on the average, the net profit per barrel sold through branches was $2.58 compared to $0.56 per barrel for sales to distributors. Table VIII compares these incomes and costs and shows the basis and magnitude of the factors. From this it is clear that, wherever feasible, it is in Falstaff's interest to operate through branches, if profit is to be maximized.

In turn, an analysis of Falstaff's sales to distributors indicates that the profitability to Falstaff of these sales is related to the volume of sales to the distributor, the degree of market penetration, and the distributor's potential for resale—i.e., his markets. This is not surprising, since larger volumes would be expected to distribute selling costs and result in improved profitability. What is perhaps surprising is the clear indication that distributors of medium volume capacity provide the most profitable market for Falstaff's sales effort by quite a substantial differential. For example, as contrasted with the 1958 average of $0.56 per barrel for all sales to distributors, medium sized distributors yielded a profit of $0.85 and more per unit. It is evident, therefore, that in invading new territory, Falstaff would be well advised to concentrate its attention on those territories and with those distributors whose volume can be expected to be of the order of 5000 or more barrels per year.

The above conclusions are applicable not only to new territory but to the intensification of Falstaff's market within its existing areas. Here, too, it will pay for Falstaff to concentrate attention on bringing up the volume of its branch operations to achieve penetration of at least 10% of the market, in order to secure good profitability from these sales. In this connection, it is to be noted that Falstaff's branch operations in San Francisco and Ft. Wayne are not

yet of such volume as to produce profits. This follows from the fact that selling and advertising expense in an area must reach at least a minimum level to be effective, while inadequate volume of sales precludes any profit.

The profitability of sales to branches and to distributors of significant sales potential would indicate that, in entering new areas, Flastaff should at first concentrate its sales and advertising support on those outlets—branches and distributors—having a high profit possibility and should by-pass others. This should result in converting new areas into profitable operation in the shortest possible time.

**Comparative Profitability of Branch and Distributor Sales**

It was mentioned above that in 1958 corporate profits per barrel on sales through branches were $2.58, or nearly five times the $0.56 per barrel profit received on sales through distributors. In short, in 1958 half the corporation's after-tax profits derived from branches, through which a quarter of the corporation's sales were made.

It is realized that many aspects of business are easier for the corporation if sales are made through distributors, but the accumulation of profit has not been one of them. Since increased profitability is the ultimate goal of the company, the entrance into new markets through potentially profitable branches appears to be nearly mandatory.

What is a potentially profitable branch? While the corporation's past history provides only a limited number of branches to use as a sample, the 1958 financial data (income statements by plants, divisions and markets) suggests that branches that will sell less than 50,000 barrels a year may well be loss operations, although this tendency toward losses will decrease if penetration is well above the 10-percent range.

While branches are suggested wherever possible for the future, obviously distributor sales will still be necessary in countless areas. An attempt to develop criteria for distributors that will be potentially profitable to Falstaff has been made. Tables IX, X and XI analyze 1958 distributor operations by ranking distributors in groups—first, by the volume of beer shipped to them from the corporation (Table IX), second, by the potential in the geographical area covered by distributors (Table X) and third, by the

penetration achieved by distributors in their areas (Table XI).

Even after allowance is made for minor statistical oddities that may have been incorporated in the data, a study of the tables indicates that the following statements might be made:

1. Distributor profitability to Falstaff was highest when volume of barrels shipped to a distributor is high.

2. The reverse is more striking. Almost invariably Falstaff has incurred losses when volume shipped to a distributor was less than approximately 5000 barrels in the year.

3. In spite of (1) and (2), losses were incurred by the corporation when the penetration achieved by a distributor group was less than 10 percent, even though barrelage volume may have been high.

4. Closely related to (1), (2) and (3) is the fact that corporation profits have been highest from distributors having a median potential rather than a very high one or a very low one.

It is now possible to summarize this section on comparative branch and distribution profitability. From the foregoing statements the following pertinent generalizations can be made relative to Falstaff's future. Inherent in the generalizations is an attempt to improve in the future by putting to good use some of the lessons we have learned in the past.

1. Where markets can provide barrelage sales of 50,000 or more without too long a delay after entrance, they should be considered for entrance through branches rather than distributorships. This volume requirement can probably be shaded downward if the possiblity of an early penetration well in excess of 10 percent exists.

2. Distributorships likely to sell less than about 5000 barrels annually should be avoided. There is no need to sell in every small nook in the U. S. Coupled with this, single distributorships should not be granted for extremely high potential areas merely to ensure large barrelage sales.

3. Distributorships should be eliminated after showing consistent losses over a period of time in spite of remedial action. The money spent in the loss operation can probably be put to better use elsewhere.

In this same vein, the financial records indicate that certain packages are loss items in certain areas. Again, after

reasonable but unsuccessful attempts have been made to correct the situation, withdrawal of the package or the product line from the market may well be a profit-making decision.

* * * * *

## RECOMMENDATIONS FOR FUTURE BREWING AND BOTTLING FACILITIES

In contemplating new brewing and bottling facilities, two basic principles are considered imperative:

1. There shall be no impairment of Falstaff quality;
2. There must be a reduction in cost per barrel—including new plant capital cost, brewing cost, and bottling and distribution cost.

The possible use of continuous processing in the production of wort and in the fermenting cellars has received careful consideration. However, we believe that at this time there is insufficient information to assure that the use of a continuous process in either brewing or fermenting would maintain Falstaff quality, although continuous processing may be desirable for the future. Further, any capital or operating cost advantages over the large scale batch process descibed below are not presently believed to warrant the risk of impairment of product quality or the possible loss of favorable public opinion due to the "making of beer by a new-fangled process," when proof is lacking with which to rebut or head off this comment through assertion of position advantages.

To produce Falstaff beer unimpaired and yet at less cost, we recommend that there be no major change in the process for making beer until adequate demonstration of its feasibility. Nevertheless, we recommend that future process facilities be designed to employ newer processes and labor saving designs wherever feasible. For example, a design is proposed which will permit one brewer and one helper to produce the wort for 4000 barrels of product in one shift, starting with malt and adjuncts in storage bins and delivering cooled wort to the fermenters in an efficient, automated plant. This operation, if performed on a three-shift-per-day basis, would produce three million barrels per year. If operations were carried on seven days a week instead of five, production would total four million barrels per year.

The type of plant proposed is shown in Figures 4 and 5. The plant would include two 2000-barrel kettles supplied with a Dorr-Oliver continuous lauter and clarification filter, which would be supplied from one mash tub and one cooker—all with "in place" cleaning. Continuous cooking and (possibly) continuous masking may be considered. The kettles, mash tub and cooker would be jacketed stainless steel vessels. Each unit, including the kettle, would have mixing equipment designed to produce a uniform and homogenous product. If required by the design, additional heat transfer surface could be supplied to the kettle through a forced circulation exchanger, so arranged that the heating surfaces could be conveniently cleaned. All of these items of equipment would be designed for efficient operation by one brewer and a helper operating from a single floor level.

In the "cellars" we would use fermenter units, each with a capacity of 12,000 barrels. There would be no fermenter building or conventional cellar construction; instead, each fermenter unit would be jacketed and insulated, thereby making each fermenter in effect a self-contained, individual cellar. Of course, the small operating house adjacent to the fermenters that provides access to all of the units would be cooled as in the conventional cellar. The same type of construction would be used for the carbonating and finishing tanks. This type of outdoor design has proved to be satisfactory in the biochemical industry and is derived from the huge, deep fermentation tanks used for the manufacture of penicillin during World War II.

In order to facilitate operations with 12,000-barrel fermenters when producing 4000 barrels of wort per day, three 4000-barrel fermenter starting tanks would be used to accumulate the large 12,000 barrel batch unit for cellar operation. Of course, smaller outdoor fermenter tanks could be utilized if required.

It is noted that the exposed or outside surface area of conventional cellars for the above production capacities is virtually the same as the surface area for all the 12,000 barrel fermentation tanks. From this it can be seen that there would be a reduction in refrigeration capacity required for the new type cellar because of the elimination of the heat loads from the necessary removal of carbon dioxide, the admission of fresh air for cellar operators,

and the heat from operating personnel, motors and electric lighting, none of which would apply with the individually jacketed 12,000-barrel fermenter units. Further, it would be possible to heat one tank for "in-place" cleaning or for removal from service without affecting the temperature of any of the other tanks in the process.

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## COMPARATIVE COSTS

Comparative preliminary cost estimates have been made for the above recommended plant design for capacities of 1,000,000 barrels and for 3,000,000 barrels per year. In

**TABLE XII**

**COMPLETE BREWERY PRELIMINARY CAPITAL COST ESTIMATES**
**(Thousands of Dollars)**

| Summary | Recommended Design | | Conventional Design | |
|---|---|---|---|---|
| | 4,000 bbl per shift per day (1 MM bbl/yr) | 12,000 bbl per day, 3 shifts (3 MM bbl/yr) | 4,000 bbl per day, 3 shifts (1 MM bbl/yr) | 12,000 bbl per day, 3 shifts (3 MM bbl/yr) |
| Bulk Stage and Handling of Grain | 400 | 775 | 400 | 775 |
| Hops Storage | 120 | 240 | 120 | 240 |
| Land Improvements | 600 | 800 | 600 | 800 |
| Steam Plant | 1,000 | 1,000 | 1,000 | 1,500 |
| Electric Substation | 100 | 100 | 100 | 150 |
| Office and Laboratory | 350 | 350 | 350 | 350 |
| Dry House for Spent Grain | 340 | 650 | 340 | 650 |
| Refrigeration | 1,000 | 2,500 | 1,000 | 2,500 |
| Sub Total | 3,910 | 6,415 | 3,910 | 6,965 |
| Brewhouse (from previous page) | 2,059 | 2,113 | 1,771 | 4,246 |
| Fermenting, Carbonating, and Finishing (from previous page) | 2,583 | 6,167 | 5,481 | 15,005 |
| Bottle Shop and Warehouse (data by Falstaff | 3,700 | 7,000 | 3,700 | 7,000 |
| Total | 12,252 | 21,695 | 14,862 | 33,216 |
| Add 30% for Engineering and Contingencies | 3,676 | 6,509 | 4,459 | 9,965 |
| Total Estimated Cost | 15,928 | 28,204 | 19,321 | 43,181 |
| Cost per bbl of capacity | $15.93 | $ 9.40 | $19.32 | $14.30 |

order that these estimates might be compared with the conventional Falstaff design, similar preliminary cost estimates were made for the conventional design at the same annual capacities. These estimates are preliminary and must remain so until adequate detailed engineering designs and layouts have been prepared to enable the calculation of a more definitive cost estimate. Nevertheless, since the estimates were prepared on the same bases in all cases, they are valuable for comparison purposes. The estimates may be summarized as follows:

It will be noted in Table XII that in every instance the new recommended design is lower in capital cost than the conventional. Actually, the cost advantages of the recommended design may be even greater than presently indicated, when more definitive estimates are available. It should also be noted that the recommended design provides for one-shift-per-day operation, with attendant savings in operating cost. If the conventional design were calculated on a single-shift basis, its cost would be appreciably increased because of the greater capacity required for producing all of the wort in one shift per day.

### COMPLETE BREWERY PRELIMINARY CAPITAL COST ESTIMATES ON BREWERIES OF CAPACITY LESS THAN ONE MILLION BARRELS IN ONE SHIFT
(Thousands of Dollars)

Because plants of reduced capacity are considered desirable, these have been estimated to have the following capital costs:

1. For a plant of 500,000 bbl/yr capacity, obtained by brewing 2000 bbl/day on 1-shift operation—$10,500,000 ($21.00/bbl of capacity).

2. For constructing a plant for 3-shift operation and an annual capacity of 1,500,000 bbl/yr brewed at 6000 bbl/day —$18,600,000 ($12.30/bbl of capacity).

3. For a plant intended for ultimate operation at 1,500,000 bbl/year on a 3-shift basis brewing 6000 bbl/day but originally constructed for use at 2000 bbl/day (500,000 bbl/yr on 1-shift operation)—$12,500,000.

Note: The estimates given under 1, 2, and 3 above are based on factoring the plant costs shown in Table XII. Accordingly, although these costs are believed to be comparative, it must be understood that they are less accurate than an actual estimated cost.

• • • • •

## BUILDING VS BUYING FACILITIES

It is evident that, of the brewing facilities recommended for the future, none are proposed to be of "conventional" design. The reason for this is twofold—to decrease capital costs and increase operating savings in order to increase net earnings per se and to increase the ratio of net earnings to net worth.

Taking past Galveston history as an example, it is clear that by the time original purchase price, cost of bottle shop replacement and cost of originally contemplated conventional brewing addition were combined, a total of approximately 14 million dollars would result. All of this equipment would have to be fitted into existing space thought suitable years ago when Southern Select acquired its property. The net production capacity would have been about 1.2 million barrels annually.

In contrast, a complete brewery with facilities of the newly proposed design and an annual 1-shift brewing output of 1 million barrels is estimated to cost 16 million dollars. It was incorporate labor-saving possibilities estimated to be worth about $400,000 annually. It would be built on new ground, allowing space for a good, industrially engineered layout. A plant of lesser brewing capacity —for example, 500,000 barrels per year on a 1-shift basis —would cost $10,500,000. The same plant to work three shifts and produce 1½ million barrels could be built for approximately 18.5 million dollars.

There appears to be ample reason, based on these estimates, for building rather than buying. Thus, we conclude that major new market entrances need not be predicated on the availability of a brewery Falstaff could purchase. This, in turn, allows better control of marketing strategy and timing, and eliminates worries of adverse Governmental anti-trust action. While operating cost savings have been mentioned, it also seems likely that the fastest way to achieve markedly reduced labor usage is to build new breweries of new design, particularly where manning requirements have not been established by precedent.

In spite of all the seemingly apparent advantages of building vs buying and renovating, this report cannot categorically recommend "always build, never buy." Under cer-

tain circumstances, buying existing facilities may still prove to be beneficial; but such situations will likely be the exception in the future rather than the rule they have been in the past, since in any event the plants should be sufficiently modified to achieve low-cost production.

SUMMER 1961

Exhibit V 13 Pg 4

THE FALSTAFF

# shield

COMPETITION; LET'S FACE IT .... page 2

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# NEW FRONTIERS FOR FALSTAFF

Except for the first few months following Repeal, when the demand for beer far exceeded the brewers' capacity to satisfy it, the brewing industry has, in the past quarter-century, known some of the keenest competition in American business. Fortunately, the "whooping and dealing" tactics practiced shortly after Repeal are no longer condoned. It has been the firms with a superior product, efficient management, and intelligent planning that have survived and emerged as today's front-runners.

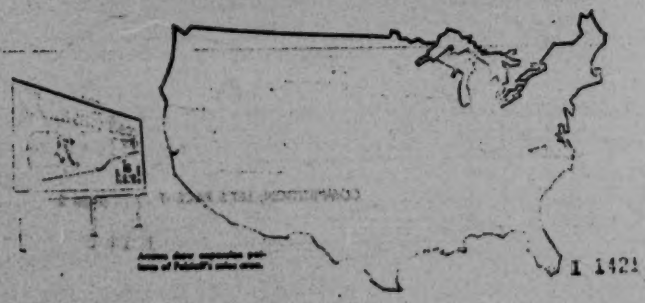
One of the key elements in Falstaff's pattern of progress has been its policy on market expansion. Realizing the importance to "keep-current," the map and establish markets in areas remote from our production centers, Falstaff management has limited limited on a gradual expansion outward from existing markets. Only after careful cultivation and consolidation of these existing market areas is a move to adjacent territory considered. In planning these advances, consideration must be given to the availability of product, qualified distributors and potential customers. Add to these factors a Falstaff pattern of over-increasing sales penetration in established markets, and you have the formula for steady progress which has typified the growth of our organization.

Presently, the expansion of production facilities at the Galveston plant is freeing some product from New Orleans for new markets in the recently created Southeast Division, which embraces the states of Alabama, Georgia, North and South Carolina, and Florida. Just last month Falstaff was made available on Florida's east coast in the Jacksonville, Daytona Beach, Orlando area.

As The Shield goes to press, management has announced the entry, during the first week of June, into the major markets of Detroit and Toledo. Our marketing forces are moving into these cities and more than a dozen others in the densely populated area of southern Michigan and northern Ohio.

But new markets are never easily won. We have yet to enter an area in which competition from other locally entrenched breweries has not been felt. In the months and years ahead, the decisions of our planners will be put to the test again and again. That it is that, although our goal is eventual national distribution, each move into new territory will be preceded by long months of careful research and planning.

Competition? We'll give them plenty of it!



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Kard.

Exhibit 1 3/3/64

22

Chronology of events re: L negotiations

5/23/57 - Contacted by Lyons & Company re our if interested in L - advised no.

4/30/61 - Contacted by Suelak relative to interest in L. Met with he and Mr. MacDonald in New York to discuss interest.

6/27/61 - Met with Suelak, Babb and MacDonald in New York to discuss further interest.

12/6/61 - Meeting in New York with Babb and Bamberg. General discussion of benefits to be gained by both companies from merger, etc. Requested additional information on L financial results, etc.

1/30/62 - Meeting between Bamberg, Westheimer, Wallace and myself at Tod's office. Reviewed possible procedure to be followed to pursue merger negotiations. Arranged to have Wallace and Cutting meeting with Tiernan to obtain more info on L.

3/6/62 - Contacted by Mr. Zagfort of Robert J. Levy & Company regarding interest of minority L stockholders selling out. Advised him we were acquainted with L management and did not need his firm's help.

4/12/62 - Met with Bamberg (in St. Louis, I believe), at which time relative offered to acquire L on following basis:

(a) 184,000 shares P common stock, plus
(b) 184,000 shares 3% convertible pfd ($50 par) - convertible after 3 years into 1.4 shares of P common.

Bamberg turned this offer down but stated he would review it with his associates and make a counteroffer.

5/4/62 - Bamberg submitted two counteroffers to Suelak - both turned down by Suelak (details of counteroffers in my file.

5/17/62 - Meeting in New York with Bamberg, Suelak, Phil Liebmann, Gardner Hadlock and myself. After much discussion, I submitted following offer which I advised I would recommend to P board for acceptance:

(a) 557,650 shares of 3% convertible pfd ($50 par), convertible after 3 years into 836,400 shares of P common (as adjusted), 7/10 of P for each share of L).

plus

(b) commission from subsequent 2/10 th of P based upon [illegible] on L earnings (details in my file).

Offer P is due on 12/6

No commitment made at this meeting, but Madison advised Bemberg and Richman that he strongly recommended acceptance of this offer. Bemberg advised that he planned to visit his family in Europe and would discuss the offer with them and would get in touch with us upon his return to USA.

6/18/62 - Upon return, Bemberg advised that family was basically opposed to incentive type deal and, in any case, felt offer too low. After discussion with F executive committee, transmitted to Suslak on 6/22/62 improvement in incentive portion of plan, together with a suggested statement of understanding for submission to Bemberg.

7/2/62 - Suslak advised that he had submitted the revised offer and statement of understanding to Bemberg, but latter stated that since several L Board members were unavailable for several weeks, he was not in position to give us an answer. I advised him we had to have an answer prior to F Board meeting on 7/23/62; otherwise, I planned to recommend to the Board that our offer be withdrawn and negotiations be terminated.

7/16/62 - Karl met with Bemberg in NYC. Bemberg advised that he was looking forward to an alliance with F, but that many improvements had taken place in the L picture since the merger discussions had begun and that with the strong possibility of a price increase forthcoming in the ice market, he did not feel he could recommend our last offer. He suggested we wait for several months to see what might develop.

8/ 2/62 - Meeting with Bemberg in NYC. I offered exchange of 1 share F for 1 share of L, with exchange of conv. pfd. for their pfd. He countered with following: He would submit our offer to his Board prior to August 25th meeting. In meantime, if price of beer increases, he wants 2 for 1.

I advised this was impossible for me to recommend and sell to F stockholders.

9/25/62 - L Board meeting postponed; no answer forthcoming; decided to wait until year end figures were in for any further discussions. Price of beer went up around November 1, 1962.

1/19/63 - Planned to meet Bemberg in New Orleans to show him Plant #4 and then take him to Plant #3 in Galveston. Bad weather forced postponement of trip.

1/28/63 (approx.) - Bemberg in St. Louis to meet with F executive committee and discuss deal further.

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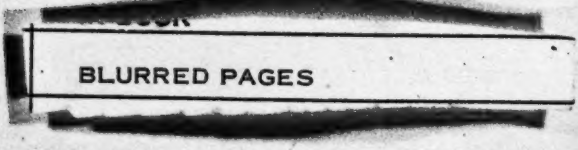


page 3

✓ 2/25/63 - F Board authorized me to make final offer of 1½ sh F for 1 sh of L.

3/14/63 - Meeting in NYC with Bamberg and Arrowsmith. Submitted F offer of 1½ sh F for 1 sh of L. Advised Bamberg that this was absolutely final. He advised he would recommend it to his Board.

3/25/63 - Submitted statement of understanding to Bamberg. Statement revised slightly and amended form signed on 4/1/63.

4/15/63 - McClellan submitted letter to anti-trust division of Justice Department.

4/24/63 - Met with Bamberg to bring him up-to-date on developments, etc.

4/24/63 - Meeting with Parkhorn, Lindley, Arrowsmith and myself with Mutual of NY to acquaint them with deal. They indicated approval and saw no problems.

4/25/63 - Arrowsmith and I met with Suslak to resolve fee, if deal is consummated.

4/30/63 - Anti-trust Division requested additional info.

GX-24

*ASSUMPTIONS:*

a) A purchase price of $26,080,920, representing—

| | |
|---|---|
| 552,846 shares common stock @ $45 | $24,878,070 |
| 2,997 shares Class A—8% preferred at par | 299,700 |
| 6,021 shares 6% preferred at par | 602,100 |
| 50% redemption premium on 6% preferred | 301,050 |
| | $26,080,920 |

b) Falstaff will exercise its option to borrow an additional $2,000,000 from Mutual @ 5¼%, to be repaid at the rate of $120,000 per year from Dec. 1, 1964 to Dec. 1, 1979, incl. and $80,000 on Dec. 1, 1980.

c) Falstaff will borrow $20,000,000 @ 6% interest, to be repaid at the rate of $1,000,000 per year during the 1st five years, and $1,500,000 per year during the next ten years (a total of 15 years).

d) Falstaff will utilize $4,080,920 of its cash reserves to complete the purchase price, at a cost of 3½% per year (loss of investment revenue).

e) Net income of L.B., Inc. will be as estimated for the years 1964 to 1967, incl. (under L.B. management) on Schedule B of our report dated Sept. 30, 1963. Any improvements brought about under Falstaff management would be plus factors.

f) That the purchase of L.B. stock would take place as of January 1, 1964.

g) That Falstaff's capital expenditures will be $4,400,000 in 1964, and $3,000,000 in each of the three succeeding years; and that L.B., Inc. expenditures will be $4,875,000 in 1964, and $800,000 in each of the three succeeding years.

h) That L.B., Inc. cash balance at December 31, 1963 will be $10,000,000, less any payments made on the new "Distribution Center".

i) That Falstaff's earnings will remain constant at $6,200,000 per year for 1964-65-66-67.

SCHEDULES ATTACHED

A. Income and Cash Flow statement for the years 1964 to 1967, incl. for the L.B., Inc. operation, and combined with Falstaff.

B. Income and Cash Flow statement for the years 1968 to 1980, incl. for the L.B., Inc. operation only (to indicate the effect on the cash flow during the period when annual payments on new borrowing will be $1,620,000.

C. Estimated Balance Sheets for L.B., Inc., and combined with Falstaff, as of January 1, 1964, and as of December 31, 1964, 1964 and 1966.

# FALSTAFF BREWING CORPORATION

## OFFICE MEMORANDUM

TO Those Listed Below: Date February 18, 1964

FROM J. H. Wambsganss

Messrs. Joseph Griesedieck
Harvey Baffa
John Hayward
F. Donald Arrowsmith
Karl Vollmer

Attached is a proposed letter Jim McClellan has prepared as a joint communication of Messrs. Gallop, Climenko and Gould, and Willson, Cunningham & McClellan addressed to the Department of Justice.

We are in process of determining some of the statistics referred to. When they are completed, they will be incorporated in the letter. We are sending this letter to Gallop, Climenko and Gould for their review and comments.

After you have had a chance to review the enclosure, we would appreciate your comments or addition, if any.

Enclosure
cc: Mr. James S. McClellan
/six enclosures

1 414

February _____, 1964

Honorable William H. Orrick
Assistant Attorney General
Department of Justice
Anti-Trust Division
Washington 25, D. C.

Dear Sir:

This letter is a joint communication of Messrs. Gallop, Climenko and Gould, 360 Lexington Avenue, New York 17, New York, attorneys for P. Ballantine & Sons, Newark, New Jersey, and Wilson, Cunningham & McClellan, 1930 Boatmen's Bank Building, St. Louis 2, Missouri, attorneys for Falstaff Brewing Corporation, St. Louis, Missouri.

During recent weeks the officers of these Companies have discussed a merger of the two enterprises and are now in substantial agreement not only as to the economic desirability of this undertaking but also as to the terms and method of carrying it into effect.

Our opinion has been requested as to whether the proposed transaction would violate any of the provisions of the Federal anti-trust laws. Upon the basis of the information submitted to us, the essential portion of which is summarized below, and for the reasons stated, we are of the opinion that the transaction is in compliance with the anti-trust laws. We should, however, appreciate your reviewing the matter and giving us the benefit of your comments.

Your files contain full and current information regarding Falstaff. As to Ballantine, we submit herewith a comprehensive report, prepared by Falstaff's representatives, upon the basis of confidential information given him by Ballantine. We shall, of course, be glad to furnish such additional information as may be required and, after you have had the opportunity to give the matter consideration, will be pleased to confer with you or members of your staff.

Products: Ballantine produces and markets a popular priced beer under the brand name "Ballantine"; an ale under the name "Ballantine XXX", which is sold at a premium price; and a special ale,

1 415

marketed at a super-premium price under the name "India Pale." Falstaff produces and markets a single brand of popular priced beer under the name "Falstaff." In its marketing territory it acts as distributor for Amstel, an imported beer. The sales of this product are insignificant in relation to total sales.

Sales by Barrels: During the year 1963, Ballantine sold _____ barrels of beer, _____ barrels of Ballantine XXX ale; and _____ barrels of India Pale ale. Falstaff sold 5,348,176 barrels of beer.

Territories Served: Ballantine's principal markets for both beer and ale are in the northeastern part of the United States (New England, New York, Pennsylvania, Delaware, and New Jersey). See Exhibit F, and its supplement, in Part II of the enclosed report. In these markets in 1963 it sold _____ barrels of beer, approximately ____ % of its total sales, and _____ barrels of ale, approximately ____ % of its total sales. The principal brands of beer sold in these markets are the following:

| | |
|---|---|
| Schaeffer | Schlitz |
| Rheingold (Liebmann) | Pabst |
| Ballantine | Carling |
| Budweiser (Anheuser-Busch) | Blatz |
| Miller | Piels |
| Knickerbocker (Ruppert) | Narragansett |
| Genesee | Schmidt |

Falstaff's principal markets are in the Midwest, South, and Southwest, where more than 85% of its output is sold. Principal brands sold in these markets are the following:

| | |
|---|---|
| Budweiser (Anheuser-Busch) | Schlitz |
| Busch Bavarian (Anheuser-Busch) | Old Milwaukee (Schlitz) |
| Falstaff | Hamm's |
| Pearl | Pabst |
| Lone Star | Blatz |
| Jax | Carling Black Label |
| Miller | Stag (Carling) |
| Coors | |

The markets served by Ballantine and Falstaff are separate and distinct. It is only in the seven Southeastern States of Florida, Georgia, Tennessee, South Carolina, North Carolina, Virginia, and West Virginia and Washington D. C. that there is any overlapping and this is insignificant so far as effect upon competition is concerned. There is set forth below a schedule showing total beer sales in these seven States, plus Washington, D. C. and the sales of Falstaff and Ballantine. The total of all brands includes sales of Budweiser and Busch Bavarian, Schlitz, Miller, Carling, Pabst and Blatz. Sales of ale are not included, since we are informed that beer and ale are different products and are not sold in competition with each other.

(Insert Schedule) 1 416

Page #3--

The greater portion of the Falstaff Florida sales (about 70%) were made in northern Florida. The major portion of the Ballantine Florida sales (about 80%) occurred in south Florida, largely in the Miami, West Palm Beach, and Fort Lauderdale area.

The following breweries are located in the above seven States (and Washington, D. C.):

(List)

Reasons for the Proposed Merger: The advantages of the proposed transaction to the two Companies involved are primarily defensive in nature. Falstaff, despite its growth and development since 1933, is still only a large regional brewer. It is too heavily dependent upon a relatively small marketing territory and this makes it dangerously vulnerable to the inroads of competition, particularly by the national brands. This competition is expected to increase. Just two items of evidence in this connection are the construction by Anheuser-Busch of a million barrel brewery in Houston, which is now under way, and the recent construction by Carling of a million barrel brewery in Fort Worth. To gain greater stability, it is essential that Falstaff expand its marketing territory and the logical direction of such expansion is the northeastern section of the United States. This can be accomplished at far less cost and with much greater assurance of gaining a foothold if undertaken through the proposed joinder with Ballantine. Ballantine's brewery in Newark, N. J. has adequate capacity for the production of Ballantine beer and ale and for the production of such amount of Falstaff as may be required for the northeastern markets. Through Ballantine's distribution system, Falstaff could be gradually and relatively inexpensively introduced in these markets. Without Ballantine, Falstaff's entry into the northeastern markets would require prohibitively heavy expenditures for advertising, for promotion, and for the building of a distributor organization from scratch. Thereafter, if a successful entry into these markets were achieved, Falstaff would be faced with the necessity of constructing

brewing facilities in this area, for it is not economically feasible to transport a popular priced beer long distances on a sustained basis. All of these costs are so great that the simple fact of the matter is Falstaff would be unable to enter the northeastern markets, except through a program of the kind under consideration.

Ballantine has suffered a steady decline in sales and earnings. The age of its management is quite high and the possibility of reversing this decline is a matter of serious concern. A merger with Falstaff, which has a relatively young and highly successful management, will give considerable defensive strength to Ballantine and materially lessen the jeopardy of its employees, distributors, and stockholders.

Effect Upon Competition: We have carefully explored the two areas in which a transaction of the kind proposed could conceivably contravene the anti-trust laws. The first is the elimination of competition between dominant factors in a market as a result of which there would be a substantial lessening of competition in that market. The second is the creation of an overriding bigness from which monopolistic control of a market or markets may reasonably be expected to flow.

It is clear that the proposed merger of Falstaff and Ballantine would not result in a substantial lessening of competition in any market. If Falstaff enjoys what could be called a dominant position in any market it would be in some of the markets of the Midwest, South, and Southwest, where more than 85% of its output is sold. Yet even here its position is a precarious one, constantly threatened by the inroads of strong competitors, including the national brands. Ballantine's principal markets are in the Northeastern States, where more than 95% of its beer is sold. These markets too are highly competitive, and the most that can be said of Ballantine is that it is one of the principal brands sold in this section of the country. Neither Company is a dominant factor in the markets in the Southeastern States, the only place where there is any measurable competition whatever between the two. Their joinder would not affect competition.

The second question is whether a Falstaff-Ballantine combination would, by reason of its bigness, tend to create a monopoly.

to recognize that a combination, to be illegal, does not have to establish a monopoly at the moment of its creation. It is sufficient that a foundation has been created upon which a monopolistic structure may be built. But, by the same token, the fact of bigness itself does not impute monopoly, incipient or otherwise. It must be demonstrated either that a monopoly has been established or that there is a reasonable possibility that it may be created as a result of such bigness.

It is true that a merger of Falstaff and Ballantine, if measured by aggregated sales, would be large (though total sales volume of the combined companies would still be only about 10% of the national market). It is not apparent, however, in what way this size would create or tend to create a monopoly. The combination would be about the same size as Anheuser-Busch and Schlitz. It would exceed each of them in total barrel sales. In dollar sales it would trail Anheuser-Busch and about equal Schlitz. In financial resources (assets and earnings) it would be substantially behind each of them. Carlings ranks fourth in the United States on the basis of barrelage sales. However, it is owned by Canadian Breweries, Ltd., whose barrel sales are unknown, but whose dollar sales, assets and earnings are greater than any American brewer. It is unrealistic to assume that a Falstaff-Ballantine combination could be employed to establish a monopoly against this kind of competition.

Since Falstaff and Ballantine serve different markets there would be no change in the structure of existing competition until Falstaff was introduced in the Northeastern markets. Then competition would be sharpened not lessened.

We have considered the possibility that the combined financial resources of Falstaff and Ballantine might be employed to destroy competition through price cutting or increased expenditures for advertising and promotion. That this is not feasible is perhaps best evidenced by the fact that the competitors in these markets, which have greater financial resources than Falstaff and Ballantine combined, have not been able to do this. Additionally, it may be pointed out that Ballantine has not lacked ample financial resources and has actually spent more per barrel on advertising and promotion than Falstaff. If price cutting or greater spending were the key to

Page 6C—

greater market control it would undoubtedly have availed itself of this advantage to check the decline in its sales.

From the evidence which has been submitted to us there is no showing that large brewers have, by virtue of their size, been able to monopolize any of the nation's markets. It is true, that there has been a high casualty rate among the hundreds of small brewers which sprang up in the period immediately following the repeal of prohibition. This was caused, however, by the economic fact that a small brewer with limited production and limited financial resources is particularly handicapped by the high cost of labor, equipment and advertising. This is not caused by bigness among brewers. It is an industry condition over which brewers have no control.

It seems to us that a merger of this kind, which clearly has a sound and salutary purpose for each Company, should not be blocked because of the possibility that from such a combination might possibly flow unrelated and unforeseeable evils which might have an adverse effect upon competition. The managements of the two Companies are of the belief that the advantages of the proposed transaction are as set forth above and that no competitive advantage will be derived from the merger which would adversely affect competition. It would appear that they should be permitted to proceed, recognizing, as they must, that if it is shown at some future time that competition has been adversely affected, then they will be subject to an order of divestiture. Since the properties and assets of the two Companies are not to be intermingled, but are to be operated separately, divestiture, if required, would not be impossible to effectuate.

We will appreciate it if you will give this matter your early attention and advise us of your views. In the meantime if there is any additional information that you may require please let us know.

Sincerely,

1 420

Exhibit 29

Thurs 17/2/63 2.45 P.M.

St Louis

Meeting re. Ebert Co.

| | |
|---|---|
| Mr Eberstadt | Jas. G |
| Pat. Zeller | Stevens B |
| | John K |
| | Howard W |

J G informed Mr. Eberstadt a deal could not be made on suggested basis

After much discussion J G. proposed that Mr. E. present to Ebert the following

| | |
|---|---|
| Cash | $ 9,000,000. |
| Bonds | 17,500,000. |
| debentures | 10,000,000. |
| | $ 35,500,000 |

No warrants

Mr E to report back to us.

Other points covered

1. Lease warrants agreed
2. Time lag on bond redemption - Interest rate?
3. Procedure - E to talk to Ebert - then us by Fri 17/2

(5) Requested Mr. E. to furnish us Barclays Sales by states 1959 thru 1963

From Harvey Ruffin 12/13/63

Mr E called - Our proposal out - considered with Grant

Per March - $41,000,000.

| | |
|---|---|
| Cash | $9,000,000. |
| Bonds debentures | 32,000,000. |
| | $41,000,000. |

Also warrant for 100,000 shares

*****

Exhibit 30

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF RHODE ISLAND

| | | |
|---|---|---|
| UNITED STATES OF AMERICA<br>Plaintiff | ) | |
| -vs- | ) | Civil Action 3523 |
| FALSTAFF BREWING CORPORATION<br>Defendant | ) | |

STIPULATION

The parties to the above entitled civil action stipulate and agree solely for purposes of the within action that:

In 1964 the eight largest sellers of beer in the six state New England area accounted for 81.2% of total sales of beer in this area.

MATTHEW W. GORING
Of Counsel for the Defendant
2200 Industrial Bank Building
Providence, Rhode Island 02903

PHILLIP F. CODY
Attorney, Department of Justice
Antitrust Division
Room 3630, 26 Federal Plaza
New York, New York 10007

October 8, 1970.

• • • • • •

Competitive pressure during 1965 prevented any major price improvement necessary to offset continuing increases in the cost of raw materials, packaging materials and labor. This factor, combined with a 2 per cent decline in Falstaff barrelage sales, accounted for much of the decline in earnings.

• • • • • •

**HI NEIGHBOR**
**NARRAGANSETT JOINS THE FALSTAFF FAMILY AND OPENS WIDE VISTAS IN NEW ENGLAND**

The purchase of Narragansett Brewing Company was officially achieved in Boston on July 15, 1965, when President Joseph Griesedieck handed to R. F. Haffenreffer, 3rd, checks totaling $17,500,000 and documents transferring $2,000,000 in Falstaff common stock.

With this action, Falstaff became owner of substantially all of the net assets of the New England brewing firm. This production unit is now operated as a wholly-owned subsidiary and designated as Plant Twelve. Behind the purchase were months of discussions, planned and necessary approval by shareowners. What did Falstaff gain through the purchase? Physically, Plant Twelve consists of a cluster of buildings on a 72-acre tract housing modern brewing, packaging, power, warehousing, shipping and office facilities. Narragansett, with a capacity rated at time of purchase at 1,500,000 barrels annually, serves the New England market through approximately 100 distributors, and has gained recognition as the sales leader in its area.

*Fallstaff's Plant Twelve—operated by the company's wholly-owned subsidiary, Narragansett Brewing Company —sparkles with efficiency and modernity. Only a portion of the plant site which covers a 72-acre tract is shown here. Plant Twelve's glistening 30-foot stainless steel lauter tun, shown in this dramatic upshot, was installed in Narragansett's new brewhouse less than two years ago. The plant's brewing equipment is among the most modern in the industry.*

*Fun and games from this popular Narragansett barrel-radio point-of-sale display in 1966 again will help sell more more beer with that "straight-from-the-barrel taste."*

Primary brands distributed under the firm's label include Narragansett Larger Beer and Ale, Krueger Beer and Ale, Ambassador Beer, Hanley Pilsner Beer, Hanley Ale, Pickwick Ale, Croft Ale and Haffenreffer Malt Liquor. Thus, with the purchase, Falstaff has gained not only an excellent, expandable production facility, but alliance with established brands—still to be actively promoted—in the growing northeastern market area.

## THE YEAR IN REVIEW

Directors of the subsidiary are Joseph Griesedieck, chairman; Harvey Beffa, vice-chairman; R. F. Haffenreffer, 3rd, president; Carl W. Haffenreffer, executive vice-president, and J. Howard Wemhoener, vice-president. Officers, in addition to the above are Fred J. Gutting, William P. Considine, William A. O'Connor, Ray J. Gruenwald and John B. Reynolds, all vice-presidents; William J. Healy, treasurer; Harry J. Pettey, secretary and assistant treasurer; R. F. Haffenreffer, IV, assistant secretary, and David H. Haffenreffer, assistant treasurer.

## COMPANY HISTORIES SIMILAR

The history and the objectives of Falstaff and Narragansett parallel in many ways . . .the modern methods of brewing . . . the early struggles to survive . . . the friendliness . . . and the dedication to quality.

Like Falstaff's, Narragansett's top officials represent the third generation of a famous brewing family. Many of the employees are second and third generation Narragansett people producing brews well known for quality. Their craftsmanship, together with experienced direction of management, has earned the excellent reputation Narragansett enjoys. Like Falstaff, one important reason for success has been the ability to keep up with or ahead of the trends of the industry through continuing modernization programs.

In New England, Narragansett was one of the first to promote its products on television. Falstaff enjoys a similar distinction in its trade area. As a sponsor of the Boston Red Sox baseball team on radio and television, Narragansett has brought play-by-play broadcasting of all games to New England fans for 22 consecutive years. Falstaff, like

**Narragansett, has long used the friendly approach in advertising. On most of Narragansett packages and advertising the phrase "Hi Neighbor" appears.**

• • • • •

## A TEN YEAR COMPARISON

| | 1956 | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 | 1965 |
|---|---|---|---|---|---|---|---|---|---|---|
| Barrels Sold | 3,869,899 | 4,291,761 | 4,501,933 | 4,747,975 | 4,911,196 | 5,128,048 | 5,309,565 | 5,548,176 | 5,819,659 | 6,336,081 |
| Net Sales | $84,811,003 | $97,092,740 | $102,255,496 | $111,625,968 | $115,934,085 | $120,331,497 | $124,649,659 | $132,074,722 | $139,464,822 | $150,972,429 |
| Earnings Before Income Taxes | $ 8,725,452 | $ 8,388,748 | $ 8,696,155 | $ 11,769,981 | $ 12,152,953 | $ 11,716,843 | $ 11,304,322 | $ 13,169,759 | $ 13,604,631 | $ 8,357,824 |
| Income Taxes | $ 4,649,000 | $ 4,309,800 | $ 4,432,900 | $ 6,373,200 | $ 6,268,000 | $ 5,926,700 | $ 5,287,300 | $ 6,898,000 | $ 6,569,000 | $ 2,852,000 |
| Net Earnings | $ 4,076,452 | $ 4,078,948 | $ 4,263,255 | $ 5,396,781 | $ 5,884,953 | $ 5,790,143 | $ 6,017,022 | $ 6,271,759 | $ 7,035,631 | $ 5,505,824 |
| Percent of Net Earnings to Net Sales | 4.8% | 4.2% | 4.2% | 4.8% | 5.1% | 4.8% | 4.8% | 4.7% | 5.0% | 3.6% |
| Total Dividends | $ 1,922,516 | $ 1,922,516 | $ 2,318,745 | $ 2,435,010 | $ 2,691,935 | $ 2,887,886 | $ 2,879,575 | $ 3,098,990 | $ 3,167,481 | $ 3,407,491 |
| Dividends Paid or Declared, on Preferred Stock | — | — | $ 396,229 | $ 312,770 | $ 293,160 | $ 9,286 | — | — | — | — |
| Amount Earned on Common Stock | $ 4,076,452 | $ 4,078,948 | $ 3,867,026 | $ 5,084,011 | $ 5,591,793 | $ 5,780,857 | $ 6,017,022 | $ 6,271,759 | $ 7,035,631 | $ 5,505,824 |
| Earnings Per Share of Common Stock—Adjusted for 1964 Stock Split | $ 1.06 | $ 1.06 | $ 1.01 | $ 1.31 | $ 1.33 | $ 1.39 | $ 1.36 | $ 1.42 | $ 1.59 | $ 1.22 |
| Dividends Paid or Declared per Share of Common Stock—Adjusted for 1964 Stock Split | $ .50 | $ .50 | $ .50 | $ .55 | $ .613 | $ .65 | $ .65 | $ .70 | $ .715 | $ .76 |
| Net Worth | $24,823,227 | $32,262,719 | $ 34,207,229 | $ 37,296,067 | $ 40,738,211 | $ 43,909,571 | $ 46,532,589 | $ 49,739,351 | $ 53,700,165 | $ 57,936,703 |
| Plant Property Less Accumulated Depreciation | $26,449,063 | $31,780,720 | $ 32,561,008 | $ 32,814,904 | $ 34,980,256 | $ 42,086,277 | $ 42,755,623 | $ 41,918,981 | $ 46,850,860 | $ 76,425,371 |
| Current Assets | $13,521,382 | $17,224,239 | $ 16,730,764 | $ 21,756,875 | $ 23,242,719 | $ 22,432,531 | $ 26,741,861 | $ 32,944,040 | $ 31,077,706 | $ 34,733,843 |
| Current Liabilities | $ 5,176,403 | $ 6,855,109 | $ 5,845,287 | $ 8,581,984 | $ 9,679,121 | $ 8,935,309 | $ 10,030,564 | $ 11,123,862 | $ 10,055,709 | $ 15,330,219 |
| Working Capital | $ 8,344,979 | $10,369,130 | $ 10,885,477 | $ 13,174,891 | $ 13,563,598 | $ 13,547,222 | $ 16,711,297 | $ 21,820,178 | $ 21,021,999 | $ 19,403,623 |
| Working Capital Ratio | 2.61/1 | 2.51/1 | 2.86/1 | 2.54/1 | 2.40/1 | 2.52/1 | 2.67/1 | 2.96/1 | 3.09/1 | 2.27/1 |
| Long-Term Debt | $ 9,580,000 | $ 9,740,000 | $ 9,028,600 | $ 8,440,500 | $ 7,893,000 | $ 12,162,900 | $ 11,401,400 | $ 10,715,000 | $ 10,020,000 | $ 29,065,000 |
| *Taxes | $40,249,858 | $43,854,347 | $ 46,005,879 | $ 50,218,059 | $ 51,655,328 | $ 53,255,431 | $ 54,412,652 | $ 77,447,207 | $ 81,160,836 | $ 82,278,079 |

* Including state excise taxes in 1963 and subsequent years.

## FIVE YEAR REVIEW OF CONSOLIDATED INCOME

(In Thousands, Except for Per Share Data)

| | 1965 | 1966 | 1967 | 1968 | 1969 |
|---|---|---|---|---|---|
| Barrels Sold | 6,336 | 7,010 | 6,631 | 6,289 | 6,192 |
| Sales | $228,150 | $250,892 | $237,572 | $225,052 | $227,879 |
| Less Excise Taxes | 77,178 | 82,761 | 77,638 | 71,246 | 71,481 |
| Net Sales | 150,972 | 168,131 | 159,934 | 153,806 | 156,398 |
| Cost of Goods Sold | 101,732 | 117,849 | 117,431 | 112,880 | 118,117 |
| Gross Profit | 49,240 | 50,282 | 42,503 | 40,926 | 38,281 |
| Less: | | | | | |
| Selling Advertising, and Delivery Expenses | 31,190 | 34,110 | 30,287 | 28,688 | 26,709 |
| Administrative and General Expenses | 7,419 | 8,239 | 8,259 | 7,033 | 7,944 |
| Income Charges and Credits—Net | 1,165 | 808 | 831 | 491 | 371 |
| Total | 39,774 | 43,157 | 39,377 | 36,212 | 35,024 |
| Income before Income Taxes | 9,466 | 7,125 | 3,126 | 4,714 | 3,257 |
| Provision for Income Taxes | 3,384 | 2,763 | 1,572 | 2,477 | 1,819 |
| Income before Extraordinary Items | 6,082 | 4,362 | 1,554 | 2,237 | 1,438 |
| Extraordinary Items, Net of Income Taxes (See Note) (Deduction) | (576) | | (2,193) | (3,098) | 174 |
| Net Income (Loss) | $ 5,506 | $ 4,362 | $ (639) | $ (861) | $ 1,612 |
| Per Share of Common Stock: | | | | | |
| Income before Extraordinary Items | $1.35 | $ .97 | $ .35 | $ .50 | $ .32 |
| Extraordinary Items, Net of Income Tax | (.13) | | (.49) | (.69) | .04 |
| Net Income (Loss) | $1.22 | $ .97 | $(.14) | $(.19) | $ .36 |

Note

The extraordinary items consist of the following: 1965—expenses incidental to packaging redesign and adjustment to conform subsidiary company accounting methods for cartons to method of parent company, less applicable income tax of $532,000; 1967 and 1968—principally write-down of certain property items, less applicable income tax of $2,192,000 in 1967 and, of $3,407,600 in 1968; 1969—sale of two plants written down to estimated salvage value in 1967 less applicable income tax of $288,417.

FOLLOWING IS AN UPDATING OF MATERIAL PREVIOUSLY FURNISHED. IT SHOWS COMPETITIVE BRAND SALES AND MARKET SHARES IN THE SIX NEW ENGLAND STATES BY BARRELS. NARRAGANSETT SALES INCLUDE ITS KRUEGER, HAFFENREFFER, HANLEY, AND CROFT BRANDS, WHICH, HOWEVER, ACCOUNT FOR A VERY SMALL PART OF ITS VOLUME.

884 5-23-70

DX F

MAINE

| | 1964 | % of Market | 1965 | % of Market | 1966 | % of Market | 1967 | % of Market | 1968 | % of Market | 1969 | % of Market |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Budweiser | 73,832 | 15.3 | 91,880 | 18.2 | 105,517 | 20.1 | 126,884 | 23.1 | 155,175 | 26.9 | 162,714 | 26.7 |
| Schlitz | 55,970 | 11.5 | 55,448 | 11.0 | 57,702 | 11.0 | 61,448 | 11.2 | 67,593 | 11.7 | 80,800 | 13.3 |
| Miller | 6,967 | 1.4 | 10,322 | 2.0 | 11,414 | 2.2 | 12,733 | 2.3 | 14,364 | 2.5 | 13,727 | 2.3 |
| Pabst | 16,562 | 3.4 | 19,883 | 3.9 | 23,689 | 4.5 | 28,670 | 5.2 | 31,887 | 5.5 | 33,033 | 5.4 |
| Schaefer | 5,612 | 1.2 | 6,519 | 1.3 | 6,915 | 1.3 | 11,033 | 2.0 | 10,944 | 1.9 | 16,403 | 2.7 |
| Carling | 51,964 | 10.8 | 46,883 | 9.3 | 49,101 | 9.3 | 45,668 | 8.3 | 54,710 | 9.5 | 67,323 | 11.1 |
| Standard | 4,899 | 1.0 | 4,252 | 0.9 | 2,586 | 0.5 | - | - | - | - | - | - |
| Dawson | 21,980 | 4.5 | 20,457 | 4.1 | 19,731 | 3.8 | 20,468 | 3.7 | 16,888 | 2.9 | 16,928 | 2.7 |
| Schmidt | 21,649 | 4.5 | 21,401 | 4.2 | 21,930 | 4.2 | 22,126 | 4.0 | 21,674 | 3.8 | 20,153 | 3.3 |
| Ballentine | 21,811 | 4.5 | 17,961 | 3.6 | 16,536 | 3.1 | 15,206 | 2.8 | 13,476 | 2.3 | 12,485 | 2.0 |
| Rheingold-Rupp | 39,820 | 8.2 | 40,865 | 8.1 | 39,246 | 7.5 | 49,471 | 9.0 | 41,478 | 7.2 | 44,161 | 7.3 |
| Narragansett | 134,507 | 27.8 | 139,930 | 27.6 | 140.006 | 26.6 | 130,842 | 23.9 | 125,978 | 21.8 | 121,304 | 20.0 |
| Falstaff | - | - | - | - | 2,708 | 0.5 | 2,666 | 0.5 | 2,047 | 0.4 | 1,513 | 0.2 |
| Other | 28,289 | 5.9 | 29,225 | 5.8 | 28,477 | 5.4 | 21,913 | 4.0 | 20,382 | 3.6 | 18,110 | 3.0 |
| TOTAL | 483,862 | 100 | 505,026 | 100 | 525,558 | 100 | 549,128 | 100 | 576,596 | 100 | 608,654 | 100 |

SOURCE: State Liquor Commission

9-23-70

VERMONT

| | 1964 | % of Market | 1965 | % of Market | 1966 | % of Market | 1967 | % of Market | 1968 | % of Market | 1969 | % of Market |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Budweiser | 31,662 | 14.4 | 43,323 | 18.2 | 58,158 | 22.5 | 72,590 | 26.4 | 87,647 | 30.2 | 87,306 | 28.5 |
| Schlitz | 11,232 | 5.1 | 12,277 | 5.2 | 15,662 | 6.1 | 17,866 | 6.5 | 21,954 | 7.6 | 34,303 | 11.2 |
| Schaefer | 35,003 | 15.8 | 40,535 | 17.0 | 44,921 | 17.4 | 51,398 | 18.7 | 55,451 | 19.1 | 61,262 | 20.0 |
| Carling | 32,547 | 14.7 | 26,149 | 11.0 | 23,483 | 9.1 | 20,472 | 7.4 | 21,610 | 7.4 | 21,650 | 7.1 |
| Ballentine | 14,813 | 6.7 | 15,638 | 6.5 | 15,792 | 6.1 | 15,686 | 5.7 | 11,696 | 4.0 | 11,789 | 3.8 |
| Rheingold-Rupp | 38,796 | 17.6 | 40,323 | 16.9 | 33,381 | 12.9 | 28,444 | 10.3 | 21,047 | 7.2 | 16,924 | 5.5 |
| Narragansett | 21,771 | 9.8 | 21,275 | 9.0 | 18,501 | 7.2 | 16,288 | 5.9 | 15,248 | 5.3 | 15,047 | 4.9 |
| Falstaff | - | — | - | - | - | - | - | - | - | - | - | - |
| Other | 35,073 | 15.9 | 38,798 | 16.2 | 48,517 | 18.7 | 52,655 | 19.1 | 55,909 | 19.2 | 58,253 | 19.0 |
| TOTAL | 220,897 | 100 | 238,318 | 100 | 258,415 | 100 | 275,399 | 100 | 290,582 | 100 | 306,534 | 100 |

SOURCE: Wholesale Malt Beverage Association

9-23-70

## NEW HAMPSHIRE
(Estimated)

| | 1964 | % of Market | 1965 | % of Market | 1966 | % of Market | 1967 | % of Market | 1968 | % of Market | 1969 | % of Market |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Budweiser | 64,152 | 14.2 | 86,494 | 18.6 | 120,994 | 24.5 | 146,655 | 28.5 | 186,917 | 34.1 | 216,323 | 37.8 |
| Schlitz | 33,971 | 7.5 | 35,930 | 7.7 | 46,206 | 9.4 | 52,767 | 10.3 | 58,781 | 10.7 | 63,183 | 11.0 |
| Schaefer | 29,364 | 6.5 | 32,605 | 7.0 | 36,050 | 7.3 | 44,799 | 8.7 | 48,954 | 8.9 | 50,612 | 8.8 |
| Carling | 34,395 | 7.6 | 30,961 | 6.6 | 31,990 | 6.5 | 29,235 | 5.7 | 33,724 | 6.2 | 34,061 | 6.0 |
| Miller | 12,200 | 2.7 | 13,094 | 2.8 | 18,157 | 3.7 | 18,279 | 3.6 | 21,915 | 4.0 | 25,998 | 4.5 |
| Ballantine | 29,905 | 6.6 | 26,031 | 5.6 | 23,127 | 4.7 | 19,496 | 3.8 | 16,078 | 2.9 | 11,736 | 2.1 |
| Rheingold-Rupp | 100,024 | 22.1 | 95,501 | 20.5 | 74,053 | 15.0 | 67,537 | 13.1 | 54,409 | 9.9 | 36,698 | 6.4 |
| Pabst | 31,031 | 6.9 | 35,680 | 7.6 | 38,149 | 7.7 | 40,723 | 7.9 | 41,550 | 7.6 | 49,560 | 8.7 |
| Narragansett | 79,280 | 17.5 | 79,362 | 17.0 | 77,965 | 15.8 | 69,532 | 13.5 | 64,377 | 11.8 | 70,454 | 12.3 |
| Falstaff | - | - | - | - | - | - | - | - | - | - | 963 | 0.2 |
| Others | 37,581 | 8.4 | 30,697 | 6.6 | 26,382 | 5.4 | 25,153 | 4.9 | 20,749 | 3.9 | 12,624 | 2.2 |
| TOTAL | 451,903 | 100 | 466,355 | 100 | 493,073 | 100 | 514,176 | 100 | 547,454 | 100 | 572,212 | 100 |

SOURCE: Market Research estimates, Field Sales estimates, Distributor estimates

CONNECTICUT
(Estimated)

| | 1964 | % of Market | 1965 | % of Market | 1966 | % of Market | 1967 | % of Market | 1968 | % of Market | 1969 | % of Market |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Budweiser | 74,983 | 5.4 | 84,558 | 5.9 | 98,444 | 6.6 | 154,499 | 10.1 | 230,711 | 14.9 | 331,650 | 21.0 |
| Schlitz | 68,040 | 4.9 | 73,093 | 5.1 | 82,036 | 5.5 | 90,252 | 5.9 | 99,098 | 6.4 | 110,550 | 7.0 |
| Miller | 97,200 | 7.0 | 106,056 | 7.4 | 116,343 | 7.8 | 120,845 | 7.9 | 128,517 | 8.3 | 126,343 | 8.0 |
| Pabst | 63,874 | 4.6 | 64,494 | 4.5 | 85,020 | 5.7 | 82,603 | 5.4 | 86,710 | 5.6 | 78,965 | 5.0 |
| Schaefer | 274,937 | 19.8 | 285,205 | 19.9 | 301,297 | 20.2 | 327,353 | 21.4 | 318,970 | 20.6 | 344,284 | 21.8 |
| Carling | 70,817 | 5.1 | 68,793 | 4.8 | 67,121 | 4.5 | 64,247 | 4.2 | 58,839 | 3.8 | 47,378 | 3.0 |
| Hull | 81,926 | 5.9 | 78,826 | 5.5 | 77,562 | 5.2 | 76,484 | 5.0 | 77,420 | 5.0 | 74,226 | 4.7 |
| Ballantine | 152,743 | 11.0 | 176,282 | 12.3 | 150,649 | 10.1 | 163,677 | 10.7 | 150,195 | 9.7 | 112,129 | 7.1 |
| Rheingold-Rupp | 291,600 | 21.0 | 273,738 | 19.1 | 281,907 | 18.9 | 279,933 | 18.3 | 224,518 | 14.5 | 224,258 | 14.2 |
| Narragansett | 74,983 | 5.4 | 77,392 | 5.4 | 70,104 | 4.7 | 70,366 | 4.6 | 57,291 | 3.7 | 56,854 | 3.6 |
| Diamond Springs | - | - | - | - | - | - | - | - | - | - | - | - |
| Falstaff | - | - | - | - | 5,966 | 0.4 | 4,589 | 0.3 | 3,097 | 0.2 | 1,579 | 0.1 |
| Piel | - | - | - | - | - | - | - | - | - | - | - | - |
| All Others | 137,468 | 9.9 | 144,753 | 10.1 | 155,123 | 10.4 | 94,841 | 6.2 | 113,033 | 7.3 | 71,069 | 4.5 |
| TOTAL | 1,388,571 | 100 | 1,433,191 | 100 | 1,491,572 | 100 | 1,529,689 | 100 | 1,548,399 | 100 | 1,579,285 | 100 |

SOURCE: Market Research estimates, Field Sales estimates, Distributor estimates

9-23-70

MASSACHUSETTS

| | 1964 | % of Market | 1965 | % of Market | 1966 | % of Market | 1967 | % of Market | 1968 | % of Market | 1969 | % of Market |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Budweiser | 344,827 | 12.0 | 422,052 | 14.4 | 525,425 | 17.3 | 647,752 | 20.1 | 808,959 | 24.6 | 822,070 | 24.2 |
| Schlitz | 174,406 | 6.1 | 188,287 | 6.4 | 219,663 | 7.3 | 263,421 | 8.1 | 335,039 | 10.2 | 446,625 | 13.2 |
| Schaefer | 248,271 | 8.6 | 269,888 | 9.2 | 281,472 | 9.3 | 287,862 | 8.9 | 288,141 | 8.8 | 323,141 | 9.5 |
| Carling | 252,113 | 8.8 | 209,966 | 7.2 | 213,858 | 7.1 | 195,413 | 6.0 | 191,345 | 5.8 | 213,763 | 6.3 |
| Miller | 88,927 | 3.0 | 115,335 | 3.9 | 144,135 | 4.8 | 159,077 | 4.9 | 180,375 | 5.5 | 169,625 | 5.0 |
| Ballantine | 162,524 | 5.7 | 158,413 | 5.4 | 141,503 | 4.7 | 145,620 | 4.5 | 119,164 | 3.6 | 95,719 | 2.8 |
| Rheingold-Rupp | 614,976 | 21.4 | 627,934 | 21.4 | 549,711 | 18.1 | 494,095 | 15.2 | 375,983 | 11.4 | 351,435 | 10.4 |
| Pabst | 119,540 | 4.2 | 135,860 | 4.6 | 140,801 | 4.7 | 138,198 | 4.3 | 152,043 | 4.6 | 143,050 | 4.2 |
| Piel | 154,128 | 5.4 | 122,839 | 4.2 | 112,575 | 3.8 | 166,652 | 5.1 | 150,262 | 4.6 | 139,513 | 4.1 |
| Dawson | 73,424 | 2.6 | 75,098 | 2.6 | 68,971 | 2.3 | - | - | - | - | - | - |
| Narragansett | 594,317 | 20.6 | 558,966 | 19.1 | 586,707 | 19.2 | 551,304 | 17.0 | 533,276 | 16.2 | 533,621 | 15.7 |
| Diamond Springs | 48,285 | 1.6 | 48,983 | 1.6 | 44,442 | 1.4 | 38,830 | 1.2 | 35,103 | 1.1 | 32,168 | 0.9 |
| Falstaff | - | - | - | - | 632 | -0- | 984 | -0- | 3,456 | 0.1 | 9,469 | 0.3 |
| Others | - | - | - | - | - | - | 153,334 | 4.7 | 114,199 | 3.5 | 114,888 | 3.4 |
| TOTAL | 2,875,738 | 100 | 2,933,621 | 100 | 3,029,895 | 100 | 3,242,542 | 100 | 3,287,345 | 100 | 3,395,087 | 100 |

SOURCE: Massachusetts Wholesalers of Malt Beverage Ind.

## RHODE ISLAND

| | 1964 | % of Market | 1965 | % of Market | 1966 | % of Market | 1967 | % of Market | 1968 | % of Market | 1969 | % of Market |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Budweiser | 38,688 | 6.6 | 51,955 | 8.8 | 68,918 | 11.2 | 90,421 | 14.7 | 118,906 | 18.9 | 134,188 | 20.7 |
| Schlitz | 19,696 | 3.4 | 20,520 | 3.5 | 27,361 | 4.4 | 32,369 | 5.3 | 41,950 | 6.7 | 53,923 | 8.3 |
| Schaefer | 9,727 | 1.7 | 12,164 | 2.1 | 12,439 | 2.0 | 13,762 | 2.3 | 16,018 | 2.5 | 17,509 | 2.7 |
| Carling | 19,587 | 3.3 | 21,235 | 3.6 | 25,839 | 4.2 | 27,691 | 4.5 | 29,080 | 4.6 | 31,203 | 4.8 |
| Ballentine | 33,548 | 5.7 | 35,682 | 6.0 | 34,257 | 5.6 | 35,424 | 5.8 | 29,066 | 4.6 | 26,201 | 4.0 |
| Rheingold-Rupp | 39,250 | 6.7 | 35,416 | 5.9 | 29,435 | 4.8 | 34,234 | 5.6 | 26,312 | 4.2 | 23,468 | 3.6 |
| Narragansett | 379,512 | 64.7 | 365,327 | 61.8 | 363,341 | 58.9 | 330,891 | 54.0 | 316,990 | 50.4 | 302,389 | 46.6 |
| Falstaff | - | - | - | - | 4,577 | 0.7 | 7,681 | 1.3 | 5,197 | 0.8 | 5,545 | 0.9 |
| Others | 46,617 | 7.9 | 49,475 | 8.3 | 50,783 | 8.2 | 40,577 | 6.5 | 45,319 | 7.3 | 53,773 | 8.4 |
| TOTAL | 586,625 | 100 | 591,774 | 100 | 616,950 | 100 | 613,250 | 100 | 628,838 | 100 | 648,199 | 100 |

SOURCE: State Liquor Commission

(1)
APPROXIMATE PRODUCTIVE CAPACITY IN BBLS. OF FIRST TEN BREWERS. SOURCE MODERN BREWERY AGE BLUE BOOK, MARCH 1970

| | |
|---|---|
| Anheuser-Busch | 22,300,000 |
| Schlitz | 17,450,000 |
| Pabst (2) | 11,750,000 |
| Falstaff (3) | 7,500,000 |
| Carling | 7,250,000 |
| Schaeffer | 5,790,000 |
| Hamm | 4,250,000 |
| Miller | 6,200,000 |
| Coors | 6,250,000 |
| Rheingold | 4,500,000 |

(1) Rated capacities are approximate only and may be substantially exceeded under special operating conditions, or by virtue of plant additions or improvements since date of rating.

(2) Does not include recently announced expansion of Peoria, Illinois, brewing facilities and construction of a $40,000,000 plant near Perry, Georgia, with annual capacity of 1,500,000 barrels.

(3) Includes Narragansett brewery (app. 1,500,000 bbls.), but excludes recently closed breweries in St. Louis, Missouri, (app. 600,000 bbls.), and El Paso, Texas (app. 225,000 bbls.).

NOTE: New Brewery construction offers, in addition to increased production, substantially decreased production cost through labor savings, thus furthering the advantage of the large well-financed brewers over the regional and local brewers. Information on this was included in data previously submitted.

## TOTAL ANNUAL SALES

## BY BREWER 1960-1969

### TOTAL ANNUAL U. S. A. SALES

| Year | Barrels |
|---|---|
| 1960 | 87,912,847 |
| 1961 | 89,038,376 |
| 1962 | 91,197,192 |
| 1963 | 93,794,003 |
| 1964 | 98,643,644 |
| 1965 | 100,411,085 |
| 1966 | 104,262,499 |
| 1967 | 106,974,363 |
| 1968 | 111,415,455 |
| 1969 | 116,271,320 |

### ANNUAL SALES OF FIRST TEN BY BREWER (In Bbls.)

| Brewer | 1960 Sales (000) | 1961 Sales (000) | 1962 Sales (000) | 1963 Sales (000) | 1964 Sales (000) | 1965 Sales (000) | 1966 Sales (000) | 1967 Sales (000) | 1968 Sales (000) | 1969 Sales (000) |
|---|---|---|---|---|---|---|---|---|---|---|
| Anheuser-Busch | 8,477 | 8,508 | 9,035 | 9,397 | 10,367 | 11,841 | 13,575 | 15,535 | 18,392 | 18,712 |
| Schlitz | 5,693 | 5,767 | 6,869 | 7,833 | 8,257 | 8,607 | 9,467 | 10,220 | 11,903 | 13,709 |
| Pabst | 4,399 | 5,217 | 5,844 | 6,672 | 7,444 | 8,219 | 9,047 | 10,124 | 10,910 | 10,225 |
| Falstaff | 4,911 | 5,128 | 5,310 | 5,548 | 5,820 | 5,704(1) | 5,649(2) | 5,382(3) | 5,108(4) | 5,030(5) |
| Carling | 4,822 | 5,047 | 5,359 | 5,681 | 5,746 | 5,263 | 5,126 | 4,917 | 5,020 | 5,440 |
| Schaeffer | 3,203 | 3,467 | 3,778 | 3,750 | 4,447 | 4.600 | 4,576 | 4,851 | 5,043 | 5,433 |
| Esan | 3,907 | 3,714 | 3,724 | 3,826 | 3,729 | 3,841 | 4,211 | 4,300 | 4,311 | 4,180 |
| Miller | 2,377 | 2,707 | 2,805 | 2,830 | 3,287 | 3,667 | 4,146 | 4,583 | 4,850 | 5,190 |
| Coors | 1,907 | 2,303 | 2,773 | 3,054 | 3,420 | 3,560 | 3,996 | 4,612 | 5,337 | 6,350 |
| Rheingold | 2,950 | 2,987 | 2,762 | 2,808 | 2,846 | 3,019 | 3,840 | 3,580 | 3,300 | 3,488 |

(1) Exclusive of Narragansett brand sales of 632,195 bbls. 1965. (part of year)

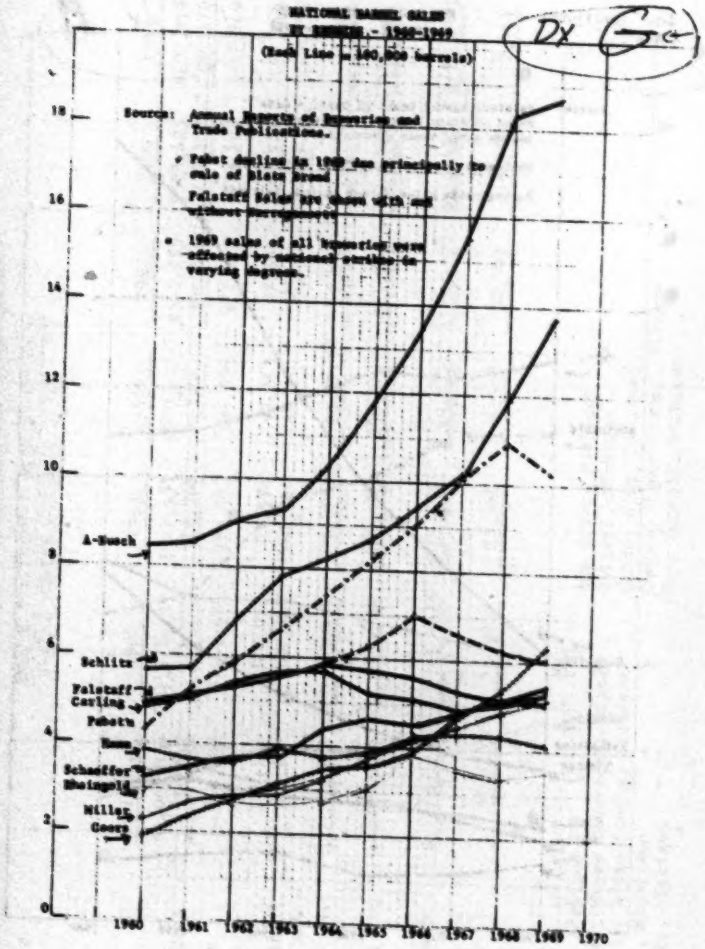
(2) Exclusive of Narragansett brand sales of 1,361,806 bbls. 1966.

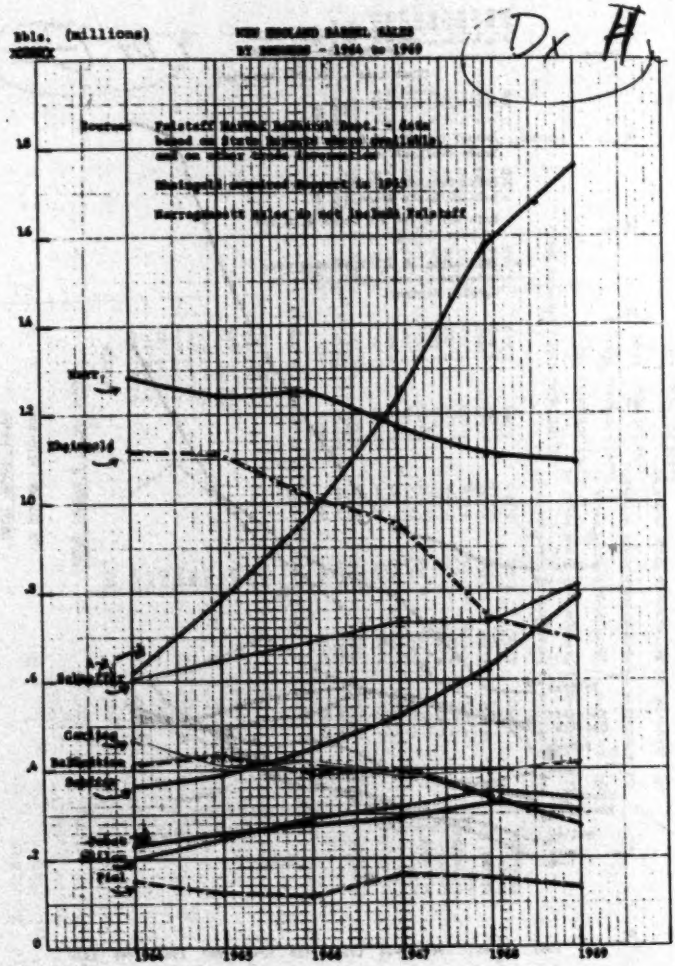
(3) Exclusive of Narragansett brand sales of 1,268,414 bbls. 1967.

(4) Exclusive of Narragansett brand sales of 1,181,225 bbls. 1968.

(5) Exclusive of Narragansett brand sales of 1,161,521 bbls. 1969.

SOURCE: U.S.B.A., Modern Brewery Age
Blue Book - March 1970


NATIONAL BARREL SALES
BY BREWERS - 1960-1969
(Each Line = 100,000 barrels)
Source: Annual Reports of Breweries and Trade Publications.
* Pabst decline in 1969 due principally to sale of Blatz brand
Falstaff Sales are shown with and without Narragansett
* 1969 sales of all breweries were affected by national strikes to varying degrees.
A-Busch
Schlitz
Falstaff
Carling
Pabst
Hamm
Schaeffer
Rheingold
Miller
Coors
0
2
4
6
8
10
12
14
16
18
1960
1961
1962
1963
1964
1965
1966
1967
1968
1969
1970


Bbls. (millions)
Dx H
1965
1966
1967
1968
1969

FALSTAFF BREWING CORPORATION AND SUBSIDIARIES

INCOME STATEMENT - DETROIT CLUSTER
TWELVE MONTHS ENDED 12/31/61 - 69

| | 1961 | 1962 | 1963 | 1964 | 1965 | 1966 | 1967 | 1969 |
|---|---|---|---|---|---|---|---|---|
| Net Sales | $1,060,534 | $1,170,177 | $542,131 | $570,021 | $545,869 | $328,425 | $202,219 | $199,830 |
| Direct Product Costs | 519,547 | 628,702 | 319,568 | 363,627 | 394,326 | 255,135 | 164,670 | 145,062 |
| Gross Profit Margin | 540,987 | 541,475 | 222,563 | 206,394 | 151,543 | 73,290 | 37,549 | 54,768 |
| Direct Marketing Expenses | 121,134 | 213,971 | 91,576 | 99,363 | 87,695 | 97,264 | 27,849 | 7,440 |
| Cluster Advertising | 389,939 | 508,644 | 163,240 | 63,556 | 97,472 | 135,730 | 79,851 | 23,727 |
| Division Selling and Advertising | 56,053 | 61,416 | 30,179 | 33,222 | 25,836 | 14,717 | 7,286 | 7,136 |
| Total | 567,126 | 784,031 | 284,995 | 196,141 | 211,003 | 247,711 | 114,986 | 38,303 |
| Division Profit (Loss) | $ ( 26,139) | $ (242,556) | $(62,432) | $ 10,253 | $(59,460) | $(174,421) | $(77,437) | $ 16,465 |
| Barrels | 57,820 | 64,919 | 35,766 | 34,360 | 30,042 | 16,849 | 9,454 | 8,996 |

Markets - Monroe, Michigan
South West Wayne County, Michigan
South East Wayne County, Michigan
Pontiac, Michigan
Roseville, Michigan
Ann Arbor, Michigan
Detroit, Michigan
Garden City, Michigan
Central Wayne County, Michigan
East Detroit, Michigan

## FALSTAFF BREWING CORPORATION AND SUBSIDIARIES

### INCOME STATEMENT - DETROIT CLUSTER
### TWELVE MONTHS ENDED 12/31/61 - 69

| | 1961 | 1962 | 1963 | 1964 | 1965 | 1966 | 1967 | 1969 |
|---|---|---|---|---|---|---|---|---|
| Net Sales | $1,060,534 | $1,170,177 | $542,131 | $570,021 | $545,869 | $328,425 | $202,219 | $199,830 |
| Direct Product Costs | 519,547 | 628,702 | 319,568 | 363,627 | 394,326 | 255,135 | 164,670 | 145,062 |
| Gross Profit Margin | 540,987 | 541,475 | 222,563 | 206,394 | 151,543 | 73,290 | 37,549 | 54,768 |
| Direct Marketing Expense | 121,134 | 213,971 | 91,576 | 99,363 | 87,695 | 97,264 | 27,849 | 7,440 |
| Cluster Advertising | 389,939 | 508,644 | 163,240 | 63,556 | 97,472 | 135,730 | 79,851 | 23,727 |
| Division Selling and Advertising | 56,053 | 61,416 | 30,179 | 33,222 | 25,836 | 14,717 | 7,286 | 7,136 |
| Total | 567,126 | 784,031 | 284,995 | 196,141 | 211,003 | 247,711 | 114,986 | 38,303 |
| Division Profit (Loss) | ( 26,139) | ( 242,556) | (62,432) | 10,253 | (59,460) | (174,421) | (77,437) | 16,465 |
| Pro-Rated Expenses | 274,035 | 334,587 | 176,432 | 136,390 | 163,221 | 87,287 | 41,513 | 44,842 |
| Profit Before Taxes | $ (300,174) | $( 577,143) | $238,864) | $128,137) | $222,681) | $261,708) | $118,950) | $( 28,377) |
| Barrels | 57,820 | 64,919 | 35,766 | 34,360 | 30,042 | 16,849 | 9,454 | 8,996 |

Markets - Monroe, Michigan
South West Wayne County, Michigan
South East Wayne County, Michigan
Pontiac, Michigan
Roseville, Michigan
Ann Arbor, Michigan
Detroit, Michigan
Garden City, Michigan
Central Wayne County, Michigan
East Detroit, Michigan

## FALSTAFF BREWING CORPORATION AND SUBSIDIARIES

### INCOME STATEMENT - CHICAGO CLUSTER
### TWELVE MONTHS ENDED 12/31/61 - 69

| | 1961 | 1962 | 1963 | 1964 | 1965 | 1966 | 1967 | 1969 |
|---|---|---|---|---|---|---|---|---|
| Net Sales | $414,616 | $452,145 | $620,404 | $804,636 | $1,848,727 | $1,488,777 | $1,276,462 | $1,871,355 |
| Direct Product Costs | 227,504 | 241,796 | 335,286 | 417,054 | 1,080,427 | 911,307 | 783,076 | 1,115,931 |
| Gross Profit Margin | 187,112 | 210,349 | 290,118 | 387,582 | 768,300 | 577,470 | 493,386 | 755,424 |
| Direct Marketing Expense | 46,222 | 48,451 | 66,157 | 151,306 | 137,599 | 142,854 | 289,397 | 235,654 |
| Cluster Advertising | 26,505 | 20,899 | 28,098 | 39,452 | 357,989 | 257,592 | 193,693 | 359,088 |
| Division Selling and Advertising | 11,600 | 11,788 | 20,766 | 56,708 | 55,949 | 27,939 | 100,361 | 288,859 |
| Total | 84,327 | 81,138 | 115,021 | 247,466 | 551,537 | 428,385 | 583,451 | 883,601 |
| Division Profit (Loss) | 102,785 | 129,211 | 175,097 | 140,116 | 216,763 | 149,085 | ( 90,065) | ( 128,177) |
| Pro-Rated Expenses | 84,665 | 93,684 | 112,074 | 160,095 | 370,019 | 365,687 | 299,606 | 370,499 |
| Profit Before Taxes | $ 18,120 | $ 35,527 | $ 63,023 | $(19,979) | $ (153,256) | $ (216,602) | $ (389,671) | $ (498,676) |
| Barrels | 21,128 | 22,755 | 29,224 | 35,517 | 71,265 | 61,881 | 57,104 | 77,856 |

Markets - Winamac, Indiana
Valdaraiso, Indiana
Rensellaer, Indiana
Gary, Indiana
Michigan City, Indiana
South Chicago, Illinois
Roseland, Illinois
Batavia, Illinois
North Chicago, Illinois
Ingleside, Illinois
Highwood, Illinois
Du Page County, Illinois
Bradley, Illinois
Chicago Heights, Illinois
Elk Grove Village, Illinois
Joliet, Illinois

FALSTAFF BREWING CORPORATION AND SUBSIDIARIES

INCOME STATEMENT - CHICAGO CLUSTER
TWELVE MONTHS ENDED 12/31/61 - 69

| | 1961 | 1962 | 1963 | 1964 | 1965 | 1966 | 1967 | 1969 |
|---|---|---|---|---|---|---|---|---|
| Net Sales | $414,616 | $452,145 | $629,404 | $804,636 | $1,848,727 | $1,488,777 | $1,276,462 | $1,871,355 |
| Direct Product Costs | 227,504 | 241,796 | 339,286 | 417,054 | 1,080,427 | 911,307 | 783,076 | 1,115,931 |
| Gross Profit Margin | 187,112 | 210,349 | 290,118 | 387,582 | 768,300 | 577,470 | 493,386 | 755,424 |
| Direct Marketing Expense | 46,222 | 48,451 | 66,157 | 151,306 | 137,599 | 142,854 | 289,397 | 235,654 |
| Cluster Advertising | 26,505 | 20,899 | 28,098 | 39,452 | 357,989 | 257,592 | 193,693 | 359,088 |
| Division Selling and Advertising | 11,600 | 11,788 | 20,766 | 56,708 | 55,949 | 27,939 | 100,361 | 288,859 |
| Total | 84,327 | 81,138 | 115,021 | 247,466 | 551,537 | 428,385 | 583,451 | 883,601 |
| Division Profit (Loss) | $102,785 | $129,211 | $175,097 | $140,116 | $ 216,763 | $ 149,085 | $ ( 90,065) | $ (128,177) |
| Barrels | 21,128 | 22,755 | 29,224 | 35,517 | 71,265 | 61,881 | 57,104 | 77,856 |

Markets - Winamac, Indiana
Valdaraiso, Indiana
Rensellaer, Indiana
Gary, Indiana
Michigan City, Indiana
South Chicago, Illinois
Roseland, Illinois
Batauia, Illinois
North Chicago, Illinois
Ingleside, Illinois
Highwood, Illinois
Du Page County, Illinois
Bradley, Illinois
Chicago Heights, Illinois
Elk Grove Village, Illinois
Joliet, Illinois

In the United States District Court for the District of Rhode Island

(Civil Action No. 3523)

UNITED STATES OF AMERICA, PLAINTIFF,

*v.*

FALSTAFF BREWING CORPORATION AND NARRAGANSETT BREWING COMPANY, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES BY THE UNITED STATES OF AMERICA

Notice is hereby given that the United States of America, plaintiff herein, appeals to the Supreme Court of the United States, under the Expediting Act, 15 U.S.C. Section 29, from the final judgment entered October 7, 1971, dismissing the complaint in this action.

HOWARD E. SHAPIRO,
ROBERT B. NICHOLSON,
*Attorneys,*

*Department of Justice Antitrust Division,*
*Washington, D.C. 20530.*

FILED DECEMBER 3, 1971.

SUPREME COURT OF THE UNITED SATES

*No. 71-873*

UNITED SATES,

Appellant,

*v.*

FALSTAFF BREWING CORPORATION ET AL.

APPEAL from the United States District Court for the District of Rhode Island.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is set for oral argument with No. 71-703.

February 28, 1972

☆ U.S. Government Printing Office: 1972—464-367/708

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# In the Supreme Court of the United States

OCTOBER TERM, 1971

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No. 71—

UNITED STATES OF AMERICA, APPELLANT

*v.*

FALSTAFF BREWING CORPORATION AND NARRAGANSETT BREWING COMPANY

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND*

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## JURISDICTIONAL STATEMENT

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### OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 18–23) is reported 332 F. Supp. 970.

### JURISDICTION

The judgment (App. B, *infra*, p. 24) of the district court dismissing the government's complaint was entered on October 7, 1971. A notice of appeal to this Court was filed on December 3, 1971 (App. C, *infra*, p. 25). The jurisdiction of the Court is conferred by Section 2 of the Expediting Act (15 U.S.C. 29). *United States* v. *Pabst Brewing Co.*, 384 U.S. 546.

## QUESTION PRESENTED

Whether the trial court applied an erroneous legal standard in holding that the acquisition by the fourth largest brewer in the United States of the largest brewer in New England did not violate Section 7 of the Clayton Act by eliminating the potential competition of the acquiring firm.

## STATUTE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
>
> * * * * * * *

## STATEMENT

The United States instituted this civil antitrust case, contending that the acquisition of the Narragansett Brewing Company ("Narragansett") by the Falstaff Brewing Corporation ("Falstaff") violated Section 7 of the Clayton Act (15 U.S.C. 18). It claimed that actual and potential competition in the New England beer market may be lessened by the

acquisition. After a trial on the merits, the district court rejected the contention of the United States and held that there was no Section 7 violation.

### A. THE NEW ENGLAND BEER MARKET AND NARRAGANSETT

The beer industry in New England is concentrated.[1] In 1964 the eight largest sellers accounted for 81.2 percent of all beer sales in the New England market (GX 30);[2] and in 1965, the year of the acquisition, the four largest sellers accounted for 61.3 percent of all beer sales (computed from DX F). While barrel sales of beer in the area increased from 1960 to 1964 approximately 9.5 percent—from just under 5.5 million to more than 6 million barrels (computed from GX 1, O–Z)—the number of brewers operating plants in the region has declined. In 1957 eleven brewers operated plants in New England; in 1964, only six did (GX 1,

[1] The parties stipulated for the purposes of this case that the production and sale of beer was a line of commerce and that New England was a section of the country, within the meaning of Section 7 of the Clayton Act (GX 1, p. 2). In New England, as elsewhere in the United States, the production of beer is subject to the federal alcohol tax; however, entry into the market is not regulated by either the federal or state government.

[2] "GX" references are to government exhibits introduced in the district court; "DX" references are to defendant's exhibits introduced in the district court. "Tr." references are to the transcript of proceedings in the district court. Since the pages of the transcript volumes are not numbered consecutively through the volumes, references are to the date of each volume. For example, "Tr. 07" refers to the transcript volume of October 7, 1970.

p. 4).[3] Seven of the nation's ten largest brewers sold beer in New England in 1965,[4] although not all seven operated plants there.

The acquired firm, Narragansett, was the largest seller of beer in New England at the time of its acquisition by Falstaff (App. A, *infra*, p. 20). With 1964 sales of 1,275,000 barrels, it accounted for approximately 20 percent of all beer sold in New England (GX 1, M; App. A, *infra*, p. 20). The company operated a modern and efficient plant in Cranston, Rhode Island, with an annual production capacity of 1.5 million barrels (GX 5, p. 17; DX A, p. 11). Between 1960 and 1964, Narragansett's net sales increased from $17.2 million to $25.2 million, and its net income increased from $417,284 to $713,083 (GX 5, p. 10). The company had a good distribution system, built upon contracts with wholesale distributors; as was the general practice in the New England beer business, these contracts were not exclusive and distributors frequently handled more than one company's beer. Narragansett from time to time switched distributors (App. A, *infra*, pp. 20–21; Tr. 014, 23–24).

[3] Three small brewers still operated in New England in 1964: Hull Brewing Co. in Connecticut, and Diamond Spring Brewery and Dawson's Brewery in Massachusetts (GX 1, pp. 3–4). Diamond Spring and Dawson's, however, were interested in being acquired by a larger brewer and suggested such acquisition to Falstaff (Tr. 013, 19–20).

[4] Those seven were Anheuser-Busch, Schlitz, Pabst, Carling, Schaefer, Ballantine, and Miller; the other three which did not sell in New England were Falstaff, Hamm, and Coors (GX 1, M; DX G and H).

### B. FALSTAFF—THE ACQUIRING CORPORATION

At the time of the acquisition Falstaff, the acquiring firm, was the fourth largest producer of beer in the United States (DX F, p. 8). Its 1964 production was 5.8 million barrels, or 5.8 percent of the nation's production (GX 5, p. 16). Starting in 1933 with a 100,000 barrel plant in St. Louis, Missouri, the company grew steadily by acquiring and expanding weak or failing breweries (GX 2, pp. 6–10; Tr. 013, 19). Between 1955 and 1964 its net sales increased from $77 million to $139.5 million, and its net income increased from $4.3 million to $7 million (GX 3F, C). As of January 1965, the company operated eight plants.[5] Falstaff had been able to finance all of its expansion projects on the basis of a good credit rating. And in 1964 the company planned a ten-year $35 million program to expand its existing plants, apart from any acquisitions it might make (Tr. 06, 57; Tr. 07, 116, 105).

Falstaff marketed its beer mainly through distributors. It had built a strong distributorship system by stimulating public demand for its beer through extensive and effective advertising and by providing distributors with a quality product at a price which allowed a good markup (GX 3B, p. 8; GX 3F, pp. 10–12). While Falstaff did not sell beer in the northeastern United States, it did sell in thirty-two mid-

[5] Subsequent to the filing of this suit, Falstaff closed one of its breweries, and thus at the time of trial it operated seven plants (Tr. 013, 67–70).

western, western and southern states, sixteen of which it entered after 1950 (GX 2, p. 11; pp. 6–10).

Although Falstaff prospered in the decade prior to the acquisition, it encountered increasingly stiff competition during the 1960s from the "national brewers"[4] (GX 5, p. 2; Tr. 06, 126; Tr. 09, 8–9)—*i.e.*, the brewers selling their products in all the significant markets in the country (Tr. 07, 57). National brewers possess important competitive advantages in that their beers have greater prestige than regional beers, and they are able to advertise on a nation-wide basis (Tr. 06, 127–128).[5] These advantages were exploited during the 1960s, resulting in large increases in sales by the nationals and more vigorous competition for regional brewers such as Falstaff (Tr. 06, 125; Tr. 09, 8–9; GX 5, p. 2).

Recognizing the advantages of national marketing status and the fact that no brewer could justly call itself national until it sold in the densely populated Northeast (Tr. 07, 57, 102), Falstaff determined to enter the northeast beer market.[6] After unsuccessful

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[4] The four "national brewers" are: Anheuser-Busch, Schlitz, Pabst, and Miller (Tr. 06, 41).

[5] National brewers also have the advantages of being less susceptible to bad weather or labor difficulties in any particular region (Tr. 128–129).

[6] Falstaff's president testified that the company had for some time wanted to enter New England as part of its interest in becoming a national brewer (Tr. 09, 102; see also Tr. 07, 18–19). As early as 1960, the management consulting firm of Arthur D. Little, in a comprehensive study commissioned by Falstaff, recommended that Falstaff enter the populous Northeast within five years by building a brewery (GX 10, pp. 5, 14, 46–47).

efforts between 1962 and 1964 to acquire two large brewers located in the New York City area,* Falstaff acquired Narragansett in 1965.

The other two large regional brewers not already in New England— Hamm and Coors, ranking eighth and ninth in national sales (GX 1, M)—were geographically remote from New England. Hamm's nearest plant to New England is in St. Paul, Minnesota, some 1,385 miles from Boston and Coors' only plant is in Golden, Colorado, some 2,000 miles from Boston (GX 1, 4).

### C. THE PROCEEDINGS BELOW

On May 26, 1965 Falstaff agreed to acquire Narragansett for about $19 million. Before the acquisition was consummated, however, the United States filed suit against Falstaff and Narragansett, alleging that the acquisition violated Section 7 of the Clayton Act by eliminating potential competition between the two brewers in the production and sale of

*In 1962 and 1963 Falstaff attempted to acquire Liebmann Breweries, a large New York City brewer that in those years was ninth and tenth in national sales (GX 22; GX 1, K and L). After those efforts failed, Falstaff unsuccessfully attempted in 1963 and 1964 to acquire P. Ballantine, of Newark, New Jersey, a brewer that in those years was sixth and seventh in national sales (GX 28; GX 29; GX 1, L and M).

During those years, Falstaff kept files of letters from distributors and potential distributors in New England who were interested in handling Falstaff beer should the company enter the New England market (GX 9).

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beer.[10] The district court denied the government's motions for a temporary restraining order and a preliminary injunction, which accompanied the complaint, and on July 15, 1965 the acquisition was completed. Shortly thereafter, the court dismissed the complaint as to defendant Narragansett. Falstaff agreed to operate Narragansett as a separate wholly-owned subsidiary until otherwise ordered or permitted by the court.

Following a trial on the merits, the district court held that the government had failed to prove that Falstaff was a potential entrant into the New England beer market (App. A, *infra*, p. 23). Rather, the court found that "the credible evidence establishes beyond a reasonable doubt that the executive management of Falstaff had consistently decided not to attempt to enter [the New England] market unless it could acquire a brewery with a strong and viable distribution system such as that possessed by Narragansett" (App. A, *infra*, p. 22). The court pointed out that the Falstaff executives had considered all the alternative means of entry, but that the management had determined that none of these would be reasonably profitable (App. A, *infra*, pp. 22–23). The court also found that both before and after the acquisition, there had been vigorous competition in the

[10] The complaint also charged that the acquisition violated Section 7 by substantially lessening potential competition in the production and sale of beer generally and by increasing industry-wide concentration in the production and sale of beer. After the parties stipulated on December 23, 1969 that the line of commerce was the sale and production of beer and that the section of the country was New England, the United States did not press these additonal charges.

New England beer market (App. A, *infra*, p. 21) and that, since the acquisition, Narragansett's share of the market had declined while the market shares of Anheuser-Busch and Schlitz had increased (App. A, *infra*, p. 21).

On this basis, the court concluded that it was "not probable" that Falstaff's acquisition of Narragansett may substantially lessen competition in the New England beer market (App. A, *infra*, p. 23).[11]

### THE QUESTION IS SUBSTANTIAL

This merger case involves the criteria for determining whether the acquiring company is a substantial potential competitor.[12] The district court relied exclusively upon its evaluation of the subjective intent of the management of the acquiring company. In our view, that standard would seriously undermine the effectiveness of Section 7 of the Clayton Act in preserving competition in the beer and other industries. Cf. *United States* v. *Pabst Brewing Co.*, 384 U.S. 546.

1. Section 7 of the Clayton Act proscribes acquisitions which eliminate significant potential competition, because potential competition is important to the preservation of actual competition in concentrated markets. *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568; *United States* v. *Penn-Olin*

[11] The court added that in any event the acquisition was procompetitive because it would enable Narragansett to compete more successfully in New England against the national brewers (App. A, *infra*, p. 23).

[12] A case presenting similar questions in the context of the regulated banking industry is presently before the Court. *United States* v. *The First National Bancorporation, et al.*, No. 71–703.

*Chemical Co.*, 378 U.S. 158. Where a concentrated market is so structured that only a limited number of firms on the edge of that market have the ability and incentive to enter, those firms are competitively significant both because they may deconcentrate the market by future independent entry, and because the possibility of entry by established firms is an external factor influencing the conduct of the firms already in the market. *Ibid.*

The preservation of potential competition is particularly important in the beer industry. Because barriers to entry by new firms are increasing and the industry is becoming highly concentrated, "[t]he most promising source of new competition is that of the established brewer moving into a new geographic market."[13] It is impossible to preserve significant potential competition, however, unless those firms which are significant potential competitors can be accurately and reliably identified. This determination, which obviously can never achieve litmus test certainty, depends upon a careful analysis of objective economic evidence, directed toward the potential entrant's financial capability, its economic incentive and the reasonable prospects of success. That subjective evidence should not play a significant part in identifying potential competitors follows from a number of factors.

First, this court has never required subjective evidence in potential competition cases. Thus, in *United*

[13] Elzinga, *The Beer Industry*, in Adams, *The Structure of American Industry*, 189, 202 (4th ed., 1971).

*States* v. *Penn-Olin Co.*, 378 U.S. 158, 175, the Court fully reviewed the objective evidence of the capability and incentive of joint venturers to enter a market independently, and concluded: "Unless we are going to require subjective evidence, this array of probability certainly reaches the prima facie stage. As we have indicated, to require more would be to read the statutory requirement of reasonable probability into a requirement of certainty. This we will not do." See also *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 580–581.

More importantly, examination of the subjective motives and intent of corporate management as to alternatives they might or might not have pursued with respect to a given market frequently compels a court to make a judgment of economic probabilities on what is bound to be self-serving testimony. Moreover, such an inquiry involves highly speculative judgments. Businessmen are often unable to predict in retrospect what they would have done had they not been able to make the acquisition which they in fact made.[14] Since, realistically, executives probably do not, when considering an acquisition, face

[14] In another Section 7 case, for example, officials of Bethlehem Steel strongly insisted that unless Bethlehem were allowed to acquire Youngstown Steel, the company would never enter the midwest steel market. The district court ruled against the merger. *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y.). Nonetheless, Bethlehem entered the market independently. See Moody's *Industrial Manual*, June 1966, p. 2861. Nor is the *Bethlehem* case unique: see *United States* v. *Ingersoll-Rand Co.*, 218 F. Supp. 530 (W.D. Pa.), affirmed, 320 F.2d 509 (C.A. 3).

the critical question of whether they would enter the market independently if they could not make the acquisition, their generalized testimony that they would not have entered except through acquisition does not shed much light on whether their firm was a potential entrant.

There is another reason why subjective evidence should be discounted in potential competition cases. As we have noted, the existence of a firm which might enter a given market is a factor influencing the conduct of firms already in that market. Since the firms in the market may well be aware of objective factors such as the outside firm's financial capacity and economic incentive to enter the market but will probably not be privy to management's thinking on whether and how to effect entry, the outside firm's impact on conduct within the market will turn on the objective factors.

In short, were subjective evidence a significant factor in the appraisal of potential entry, identification of potential competitors would be grounded on unreliable, and to some extent irrelevant, indicators. The antitrust consequences of any acquisition would be largely unpredictable both to the businessmen and to the government. By contrast, a test of potential entry that relies essentially on objective evidence of the attractiveness of the market and the firm's capability and incentive to enter it provides district courts with a means of analysis that will give greater certainty and reliability to their decisions.

2. In this case, the district court not only gave significant weight to subjective evidence, but based its judgment solely on its determination that Falstaff's management did not intend to enter the New England market by any means other than acquisition of a market leader. In so doing, the court ignored the extensive evidence which the United States presented showing the concentrated structure of the New England beer market, the relatively few potential entrants in that market, Falstaff's position as one of these few, and its substantial incentives and abilities to enter *de novo* or by a toehold acquisition.

At the time of the acquisition, Narragansett was the leading seller of beer in New England, accounting for 20 percent of the market. It was financially healthy, had experienced good growth, and was a strong and viable competitor whose survival did not depend on acquisition by a larger firm. Falstaff, in turn, had every reason to enter New England independently in order to achieve its desired goal of becoming a national brewer—a goal which recognized the economic fact that national brewers had substantial competitive advantages over regional brewers (Tr. 06, 125–126; Tr. 08, 103).

Falstaff could have entered the New England market *de novo*. In 1959 it commissioned the management consulting firm of Arthur D. Little to study its entire business. The Little study, delivered to Falstaff in 1960, recommended that Falstaff enter the northeast market, including the Middle Atlantic States, by building a brewery near Baltimore (GX 10, 15–16,

107–108). Although Falstaff accepted several of Little's other suggestions for expansion, it apparently rejected, in favor of entry by acquisition, the recommendation to build a brewery in the Northeast (GX 10, 41; Tr. 06, 82, 85–88). It made this decision even though the Little study had warned that entry by acquisition would prove more costly (GX 10, 108).[14]

Falstaff might also have entered the New England market by a "toehold entry"—buying a small brewery and expanding it.[15] Falstaff's development shows a history of expansion through acquisition of small, failing breweries, which it thereafter enlarged and modernized (GX 2, 2–6). Breweries existed in New England which, if acquired, could have provided a base for such operations—Hull Brewing Co. in New Haven, Connecticut, with a capacity of 100,000 bar-

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[14] From the frequent expansion of plants it had purchased, Falstaff was thoroughly familiar with the technology and construction of breweries. A New England plant would, to be compatible with efficient operation, require a capacity of at lease one million barrels (Tr. 013, 69; Tr. 014, 9; GX 10, 107). Falstaff's economist estimated that the cost of building such a facility would be about twenty million dollars, just over the price paid by Falstaff for Narragansett (Tr. 08, 116). Even if a new plant had cost more, there is little doubt that Falstaff could have financed it. The company was financially healthy and had obtained financing for all its projects in the past (Tr. 06, 57). Indeed, in 1964 the company planned a ten-year $35 million program to expand its existing plants; Falstaff's vice-president for finance remained confident that Falstaff could at the same time raise $35,000,000 more, if necessary, to acquire Ballantine (Tr. 07, 116, 105) (see n 9, *supra*).

[15] See *The Bendix* Corp. (FTC), 3 Trade Reg. Rep. ¶ 19,288, vacated and remanded on other grounds, *Bendix Corp.* v. *Federal Trade Commission*, (C.A. 6, No. 20,687, October 18, 1971).

rels, Diamond Spring Brewery in Lawrence, Massachusetts, with a capacity of 100,000 barrels, and Dawson's Brewery in New Bedford, Massachusetts, with a capacity of 750,000 barrels (GX 1, 3–4). Both Diamond Spring and Dawson's had made overtures to Falstaff inviting acquisition (Tr. 013, 19–20).[17] Falstaff could have obtained the financing to acquire and expand a small brewery (Tr. 07, 105; Tr. 06, 57).

In addition, Falstaff has had extensive experience in the building and maintenance of distributor organizations and could have developed a strong system in New England had it entered the market other than by acquiring Narragansett. According to Falstaff's president, to achieve an effective wholesale distribution system in New England, a new entrant had to offer distributors a company marketing plan backed by sufficient advertising expenditures to promote the product to the buying public, a wholesale price permitting a profitable mark-up and a product with a good reputation (Tr. 06, 45). Falstaff could have provided these three elements. It is not surprising therefore, that between 1960 and 1964 it had received numerous unsolicited letters of inquiry from beer

[17] Two of these plants were small; but so were almost all of Falstaff's plants at the time of acquisition. For example, Falstaff entered the California market by acquisition in 1952 of the Pacific Brewing & Malting Co., which had a capacity of only 200,000 barrels (GX 2, 4). While Diamond Spring and Dawson's may not have been prosperous in the 1960s, Falstaff's president testified that Narragansett was the first brewery acquired by Falstaff that at the time of acquisition was not "dying or dead" (Tr. 013, 19).

distributors in New England who wished to handle Falstaff (GX 9). Many other distributors were potentially available to handle a well advertised brand which could return them a good profit, because in New England distributors do not have exclusive distributorship contracts (Tr. 014, 23–25).

In our view, the district court employed an erroneous standard in concluding that Falstaff was not a potential entrant into the New England beer market other than through acquisition of Narragansett.[18] The court relied wholly on evidence of management's stated intent and made no attempt to analyze the detailed objective evidence establishing Falstaff's financial capacity and economic incentive to enter the market either *de novo* or by toehold acquisition.[19]

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[18] The district court also failed to make the detailed findings required by F.R. Civ. P. 52(a) and this court's decisions. Cf. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651.

[19] The district court's conclusion that the acquisition was procompetitive because it would enable Narragansett to compete more successfully with the national brewers is not only without support in the record, but also does not validate the acquisition. See *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 370–371; cf. *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 374–375.

## CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

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JANUARY 1972.

## APPENDIX A

District Court of the United States for the District of Rhode Island

(Civil Action No. 3523)

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

FALSTAFF BREWING CORPORATION AND NARRAGANSETT BREWING COMPANY, DEFENDANTS

OPINION

October 7, 1971

DAY, *District Judge.* This is an action brought by the United States pursuant to the provisions of Section 15 of the Clayton Act, 15 U.S.C. § 25, for declaratory and injunctive relief to enjoin the proposed acquisition by Falstaff Brewing Corporation (Falstaff) of all the assets of Narragansett Brewing Company (Narragansett) on the ground that the effect of the proposed acquisition may be substantially to lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.[1] As appears from the allegations of

[1] Section 7 reads in pertinent part as follows:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation

the Government's complaint and the evidence presented during the trial of this action, Falstaff and Narragansett, on May 26, 1965, had executed an "Agreement Pursuant To Plan Of Complete Liquidation" under the provisions of which Falstaff would acquire all the assets and assume the debts and liabilities of Narragansett on July 15, 1965.

The instant action was filed on July 13, 1965. In its complaint the Government sought a temporary restraining order and a preliminary injunction enjoining the defendants from consummating said acquisition agreement. I declined to grant said temporary restraining order and after a hearing on July 14, 1965, denied the Government's prayer for a preliminary injunction against Narragansett. At that time service of process had not been made upon Falstaff. On July 15, 1965, Falstaff acquired the assets and assumed the debts and liabilities of Narragansett. Service of process was made on Falstaff on July 21, 1965, at St. Louis, Missouri, where its principal place of business was located.

Subsequently Narragansett's motion to dismiss this action as to it was granted and Falstaff agreed to maintain Narragansett as a separate wholly-owned subsidiary until otherwise ordered or permitted by this Court. Extensive pre-trial discovery was then conducted by the parties. Finally, on May 18, 1970, an

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engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

order was entered by this Court that all said discovery should be completed not later than June 30, 1970.

Trial upon the plaintiff's prayer that Falstaff be required to divest itself of Narragansett began on October 6, 1970, and was concluded on October 15, 1970. At the conclusion thereof I reserved decision pending the filing of briefs by counsel for the parties and the preparation of the transcript of the evidence presented during the trial. These briefs were subsequently filed and have been carefully considered by me.

The Government contends that Falstaff's acquisition of all the assets of Narragansett violates the provisions of said Section 7 of the Clayton Act because it will substantially lessen competition in the New England beer market, so-called, by eliminating the potential competition that would have been created and would have existed if Falstaff entered said market independently. It further contends that at the time of said acquisition Falstaff was a potential entrant into said market. Falstaff denies that it was a potential entrant into said market and denies that it would have entered said market except by acquiring Narragansett, which had an established, strong and viable distribution system that would assure an adequate distribution of its brand of beer.

The evidence adduced at trial establishes the following facts. Said New England beer market comprises the six New England states. Said beer market at the time of said acquisition was a highly competitive market. Narragansett was then the largest seller of beer in said market with approximately twenty (20) per cent of the sales therein. It had a strong, viable distribu-

tion system. Falstaff had its principal brewery in St. Louis, Missouri, and owned several smaller breweries elsewhere, of which the nearest to New England was located in Fort Wayne, Indiana. Falstaff was not a national brewer but was desirous of eventually attaining national status by penetrating the northeastern metropolitan market. The evidence also establishes that its management was firmly committed against attempting to penetrate said northeastern metropolitan market until it could obtain a strong, viable distributor organization therein.

The opportunity to secure such a distributor organization in New England was presented in 1964 when the Haffenreffer family, the owners of Narragansett, motivated by increasing competitive pressure from national brewers in the New England beer market and the desire to lend diversity and security to their personal estates, contacted officers of Falstaff with the view of selling its assets to Falstaff. As hereinbefore recited, the evidence establishes beyond doubt that the New England beer market was then characterized by intense, vigorous competition. The evidence further establishes that since Falstaff's acquisition of Narragansett on July 15, 1965, there has been no diminution of the intensity and vigor of said competition. It further establishes that Narragansett's share of the New England beer market had been reduced from 21.5% in 1964 to 15.5% in 1969, while the combined shares of the two leading national brewers (Anheuser-Busch and Schlitz) in said market had increased from 16.5% to 35.8%.

It is well settled that post acquisition evidence is admissible in an action such as this and may properly be considered in determining whether the probable effect of said merger will be a substantial lessening of competition in said New England beer market. United States v. Pabst Brewing Co., 384 U.S. 546 (1966); F.T.C. v. Consolidated Foods Corp., 380 U.S. 592 (1965); United States v. du Pont & Co., 353 U.S. 586 (1957). In this case there is no evidence that Falstaff during said period did not make every effort to realize the benefits it hoped to obtain by the acquisition of Narragansett.

The Government's contentions that Falstaff at the time of said acquisition was a potential entrant into said New England market, and that said acquisition deprived the New England market of additional competition are not supported by the evidence. On the contrary, the credible evidence establishes beyond a reasonable doubt that the executive management of Falstaff had consistently decided not to attempt to enter said market unless it could acquire a brewery with a strong and viable distribution system such as that possessed by Narragansett. Said executives had carefully considered such possible alternatives as (1) acquisition of a small brewery on the east coast, (2) the shipping of beer from its existing breweries, the nearest of which was located in Ft. Wayne, Indiana, (3) the building of a new brewery on the east coast and other possible alternatives, but concluded that none of said alternatives would have effected a reasonable probability of a profitable entry for it in said

New England market. In my considered opinion the plaintiff has failed to establish by a fair preponderance of the evidence that Falstaff was a potential competitor in said New England market at the time it acquired Narragansett. The credible evidence establishes that it was not a potential entrant into said market by any means or way other than by said acquisition. Consequently it cannot be said that its acquisition of Narragansett eliminated it as a potential competitor therein.

I also find that the Government has failed to establish by a fair preponderance of the evidence that said acquisition by Falstaff will probably result in a substantial lessening of competition in the New England beer market. Section 7 of said Clayton Act is concerned with probabilities, not mere possibilities. Brown Shoe Co., Inc. v. United States, 370 U.S. 294 (1962). It is my considered opinion that said acquisition by Falstaff will serve to improve the competitive position of the Narragansett brand of beer in the New England beer market which is intensively competitive, and enable it to compete successfully with the brands of large, national breweries which dominate said market.

Finding, as I do, that it is not probable that said acquisition of Narragansett by the defendant Falstaff may substantially lessen competition in said New England beer market, judgment must be and will be entered in favor of the defendant Falstaff Brewing Corporation.

(s) EDWARD W. DAY,
*District Judge.*

## APPENDIX B

**District Court of the United States District of Rhode Island**

**(C.A. No. 3523)**

**UNITED STATES OF AMERICA, PLAINTIFF**

***v.***

**FALSTAFF BREWING CORPORATION AND NARRAGANSETT BREWING COMPANY, DEFENDANTS**

**JUDGMENT**

**This action came on for trial before the court sitting without jury and the issues having been duly tried and the court having filed its opinion, dated October 7, 1971, directing that judgment must be entered in favor of the defendant, Falstaff Brewing Corporation, it is ORDERED and ADJUDGED:**

**That the complaint herein be and the same is hereby dismissed.**

**Dated: October 7, 1971.**

**Approved:**

**EDWARD W. DAY,**

***United States District Judge, October 7, 1971.***

## APPENDIX C

### In the United States District Court for the District of Rhode Island

(Civil Action No. 3523)

UNITED STATES OF AMERICA, PLAINTIFF,

*v.*

FALSTAFF BREWING CORPORATION AND NARRAGANSETT BREWING COMPANY, DEFENDANTS

### NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES BY THE UNITED STATES OF AMERICA

Notice is hereby given that the United States of America, plaintiff herein, appeals to the Supreme Court of the United States, under the Expediting Act, 15 U.S.C. Section 29, from the final judgment entered October 7, 1971, dismissing the complaint in this action.

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FILED DECEMBER 3, 1971.



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Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18 (1964), Section 7 2 et seq.

Federal Rules of Civil Procedure, Rule 41(b) 4n.

Federal Rules of Civil Procedure, Rule 52(a) 4

MISCELLANEOUS.

Anti-Trust Developments, 1955-1958, A Supplement to the Report of the Attorney General's National Committee to Study the Anti-Trust Laws (1968), at pp. 86-87 14n.

Davidow, Conglomerate Concentration and Section Seven: The Limitations of the Anti-Merger Act, 68 Colum. L. Rev. 1231 8n.

S. Rep. No. 1775, 84 Cong., 1st Sess. 1950, U.S. Cong. and Ad. News, vol. 2, p. 4298 13n.

# Supreme Court of the United States.

OCTOBER TERM, 1971.

No. 71-873.

UNITED STATES OF AMERICA,
*Appellant,*

*v.*

FALSTAFF BREWING CORPORATION,
*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND.

## APPELLEE'S MOTION TO AFFIRM THE JUDGMENT BELOW.

Appellee moves this Court to affirm the judgment of the United States District Court for the District of Rhode Island on the grounds that the decision below is supported by the evidence and the question presented upon this appeal is not substantial.

### The Principal Question Restated.

Appellant's jurisdictional statement misstates the question presented to this Court. The question should be,

"Was the district court warranted in finding that the government failed to establish by the fair preponder-

ance of the evidence that Falstaff was a likely entrant into, or otherwise a potential competitor in, the New England beer market other than by the acquisition of a brewery with an effective distributor organization and, accordingly, that the acquisition of Narragansett by Falstaff was not likely to, and did not in fact, result in a substantial lessening of competition in the New England beer market?"

## Statute Involved.

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18 (1964), is the statute involved and is correctly set forth at page 2 of the Jurisdictional Statement.

## Statement.

### The Proceedings Below.

On July 15, 1965, Falstaff Brewing Corporation (Falstaff) acquired the assets and assumed the debts and liabilities of Narragansett Brewing Company (Narragansett) in accordance with an agreement dated May 26, 1965 (GX 4).[1] On July 13, 1965, this suit was brought. On motion of Narragansett, the suit was dismissed as to it and judgment was entered accordingly. There was no appeal.

Trial of the action began October 6, 1970, and was concluded October 15. The government relied exclusively

[1] As numerous references will be made herein to the transcript and exhibits introduced below, on January 10, 1972, the appellee requested the Clerk of the United States District Court for the District of Rhode Island to transmit the record to this Court.

References to "DX" are to defendant's exhibits introduced in evidence in the district court, "GX" to government exhibits introduced in evidence in the district court, and "Tr." references are to the trial transcript. Since the pages of the trial transcript are not numbered consecutively through the volumes, references are to the date of each volume. For example, "Tr. 07" refers to the transcript volume of October 7, 1970.

on documentary evidence, excerpts of depositions of principal officers and employees of Falstaff, answers to interrogatories and stipulations in its attempt to prove its case. It presented no live testimony.

The district court found,

> "... [T]he plaintiff has failed to establish by a fair preponderance of the evidence that Falstaff was a potential competitor in said New England market at the time it acquired Narragansett. The *credible* evidence establishes that it was not a potential entrant into said market by any means or way other than by said acquisition. Consequently it cannot be said that its acquisition of Narragansett eliminated it as a potential competitor therein.
>
> "... [T]he Government has failed to establish by a fair preponderance of the evidence that said acquisition by Falstaff will probably result in a substantial lessening of competition in the New England beer market." *United States* v. *Falstaff Brewing Corporation*, 332 F. Supp. 970, 972 (R.I. 1971). (Emphasis added.)

The court went on to hold,

> "... [S]aid acquisition by Falstaff will serve to *improve the competitive position* of the Narragansett brand of beer in the New England beer market which is *intensively competitive*, and enable it to compete successfully with the brands of large, national breweries which dominate said market." (*Id.* at pp. 972-973.) (Emphasis added.)

**The Question Presented is Not Substantial.**

1. *The sole issue in this case is whether the trial court's findings of fact were clearly erroneous.* The government contends that the trial court applied an erroneous legal

standard in arriving at its finding that the acquisition did not violate section 7 (Jurisdictional Statement, p. 2). Upon careful examination of the Jurisdictional Statement, we conclude that the government's real complaint is that the trial court relied "exclusively" upon evidence of the subjective intent of the management of the acquiring firm.[3] That this is not true appears from the record below and the plain language of the opinion below. *United States* v. *Falstaff Brewing Corporation, supra,* 332 F. Supp. at 972. The government's complaint, moreover, disregards the substantial statistical evidence which was before the trial court and the testimony of witnesses who were not a part of Falstaff's management. It becomes clear, therefore, that the real basis of this appeal is that the government disagrees with the trial court's findings and wants this Court to try the matter *de novo.*

Such requests have been consistently denied.[3] *E.g., United States* v. *Yellow Cab Co.,* 338 U.S. 338, 341-342 (1949); *United States* v. *Oregon State Medical Society,* 343 U.S. 326, 339-340 (1952). The government is bound, as is any other litigant, by the provisions of Rule 52(a);[4] the decision of the trial court may not be set aside unless clearly erroneous. *United States* v. *Yellow Cab Co., supra,* at 341-

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[2] The issue as the government perceives it is stated as follows:

> "The district court relied exclusively upon its evaluation of the subjective intent of the management of the acquiring company. In our view, that standard would seriously undermine the effectiveness of Section 7 of the Clayton Act in preserving competition in the beer and other industries." (Jurisdictional Statement, p. 9; *see also* Jurisdictional Statement, pp. 11-13.)

[3] The instant case is unlike *United States* v. *Pabst Brewing Co.,* 384 U.S. 546 (1966), where the district court granted dismissal under Rule 41(b) of the Federal Rules of Civil Procedure at the close of the government's case. A similar motion was made herein and denied (Tr. 08, pp. 5, 8).

[4] Federal Rules of Civil Procedure.

342. And the trial court's findings are entitled to particular weight insofar as they relate to design, motive and intent. *United States* v. *Yellow Cab Co., supra,* 338 U.S. at 341. The record below supports the district court's finding that the government failed in its burden of proof, and is not, therefore, clearly erroneous.

2. *The government failed to prove by the fair preponderance of the evidence that Falstaff was a potential competitor in the New England beer market and that the acquisition would probably result in a substantial lessening of competition.* To establish a violation of section 7, the government was required to prove by the fair preponderance of the evidence that there had been a "merger between two corporations engaged in commerce and that the effect of the merger may be substantially to lessen competition or tend to create a monopoly in any line of commerce *'in any section of the country.'* " *United States* v. *Pabst Brewing Co., supra,* 384 U.S. at 549. (Emphasis in original.) Falstaff does not contest the fact that a merger between it and Narragansett took place.

It was stipulated that the production and sale of beer was the line of commerce (GX 1, ¶ 5) and that the New England states[5] taken together constituted a "section of the country" (and the relevant market) (GX 1, ¶ 6). The sole contested issue was whether the *probable*[6] result of the

[5] The New England states were stipulated to be Maine, New Hampshire, Vermont, Massachusetts, Connecticut and Rhode Island (GX 1, ¶ 6). The term "New England" should not be considered co-extensive with the term "Northeast" or the term "East Coast Market" which include the New England states as well as Ohio, Pennsylvania, New York, New Jersey and perhaps Maryland and Delaware (GX 10, p. 47). The government wrongly equates New England with Northeast and East Coast (Jurisdictional Statement, n. 8, at p. 6).

[6] We italicize the word *"probable"* because section 7 is concerned with probabilities not mere possibilities:

merger would be to substantially lessen competition in New England in the production and sale of beer.

The thrust of the government's case is that the merger will lead to a lessening of competition in the New England beer market by eliminating *potential* future competition between Falstaff and Narragansett (Tr. 06, pp. 3-4; Jurisdictional Statement, pp. 10-16). The government does not rely upon the elimination of actual competition as Falstaff and Narragansett were not competitors in the relevant market or anywhere else at the time of the acquisition (GX 1, ¶ 14; DX F; Tr. 06, p. 3).

The government advances three theories of potential competition:

(a) That Falstaff was a potential entrant in the New England market independently ("*de novo*")[7] or

(b) That Falstaff was a potential entrant by means of a "toehold" acquisition[8] or

(c) That Falstaff was "standing in the wings" and presented the existing sellers with the threat of entry by one of the foregoing means.[9]

Proof of at least one of the foregoing was essential to establish that the acquisition would have the anti-competitive effect proscribed by section 7.

*Falstaff was not a potential entrant into the New England market independently.* The government's proof has as

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"[C]ongress used the words '*may be* substantially to lessen competition' (emphasis supplied [by the court]), to indicate that its concern was with probabilities . . . no statute was sought for dealing with ephemeral possibilities." *Brown Shoe Co., Inc.* v. *United States*, 370 U.S. 294, 323 (1962).

[7] *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).

[8] *The Bendix Corp.* (FTC), 3 Trade Reg. Rep. ¶ 19,288, vacated and remanded on other grounds, *Bendix Corp.* v. *Federal Trade Commission*, F. 2d (6th Cir. No. 20687, October 18, 1971).

[9] *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

its cornerstone the recommendation contained in a study made by Arthur D. Little, Inc., that Falstaff enter the "East Coast Market" (*see* n. 5, *supra*) by building a brewery before 1965 near Baltimore, Maryland[10] (GX 10, pp. 14, 16; Jurisdictional Statement, pp. 13-14). To buttress the Little report, the government refers to Falstaff's desire to enter the New England beer market as part of its attempt to become a national brewer[11] (Jurisdictional Statement, n. 8, at p. 6), and Falstaff's apparent financial ability to undertake the construction (Jurisdictional Statement, n. 15, at p. 14).

The government considers unworthy of mention the uncontradicted evidence (not objected to below) that Falstaff's management never entertained the notion of entering the New England market by building a brewery unless it first had an effective distributor organization (Tr. 07, pp. 17, 71; Tr. 08, pp. 30-31; Tr. 09, p. 106). These were not merely statements of subjective intent but rather resulted from the financial reverses suffered by Falstaff in earlier attempts to penetrate the Detroit, Chicago and Southern California markets (Tr. 09, pp. 104-108; *see also* DX I and J). Because Falstaff was unable to establish an effective distrib-

[10] The government has abandoned an alternate theory of independent entry which it pursued at trial. That theory was that Falstaff could have entered the New England market by shipping from its existing plants (Tr. 06, pp. 19-26). It is well that it abandons it because the evidence established that (a) Falstaff did not have the productive capacity in existing plants to enter in that fashion without creating shortages in its existing markets (Tr. 08, pp. 113-114), and (b) based upon its prior experience involving similar distances, shipping such distances would have resulted in losses (Tr. 13, p. 96).

[11] To a greater or lesser degree this evidence was based solely on statements made by Falstaff's management at their depositions, or in annual reports or press releases. To the extent those statements bear on Falstaff's intent, we would suppose that they are suspect in the government's view (Jurisdictional Statement, pp. 10-12). Or are such statements suspect only when they are unfavorable to the government's case?

utor system in any of these markets, its efforts were a dismal failure.[13]

While the Little report did recommend building new breweries rather than buying (GX 10, p. 108), that recommendation was based upon the assumption that certain technological innovations could be implemented (GX 10, pp. 92-97). On the basis of these assumptions, Little advised Falstaff that it could build a 1,000,000 barrel capacity plant at a cost of $15.93 per barrel of beer produced (GX 10, p. 98). But these innovations were tested by Falstaff and Falstaff was unable "to come up with a satisfactory design" (to implement them) (Tr. 13, p. 17). This fact alone makes suspect, at the very least, the Little cost estimates and the recommendations based thereon.[14]

To prove only that Falstaff had the financial ability to construct a brewery was altogether insufficient. It was incumbent upon the government to prove further that entry in this fashion would be a rational economic undertaking for Falstaff.[15] The evidence demonstrates that it was not.

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[13] The Little study recommended that Falstaff build a brewery in southern California (GX 10, p. 16). Falstaff went so far as to buy land in southern California which it later sold when it became apparent that the demand for its beer could not justify the construction of a brewery (Tr. 09, pp. 107-108).

[14] The implementation of the Little report recommendations were, at least insofar as those dealing with new markets, singly unsuccessful. For example, Little recommended construction of a plant in southern California (GX 10, p. 16) and entry into the Detroit and Chicago markets (GX 10, p. 14).

[15] In considering probable potential entry, one commentator has listed the criteria in the following fashion:

> "The acquiring firm—when judged in terms of its objective capability, its *rational economic interest* and its evidenced interests—should be a likely direct competitor of the acquired firm at some time in the future." Davidow, Conglomerate Concentration and Section Seven: The Limitations of the Anti-Merger Act, 68 Colum. L. Rev. 1231, 1244 (1968). (Emphasis added.)

Dr. Ira Horowitz, an economist with impressive credentials as well as the benefit of extensive studies of the brewing industry, testified that the highest return on net worth Falstaff could expect to make from the construction of a brewery would be less than 6.7%, the lowest return on net worth earned by any major industry in 1969, and well below the 15% return projected by Little (Tr. 08, p. 116; GX 10, p. 18). This minimum return was based on what Dr. Horowitz classified as "exceedingly optimistic" assumptions (Tr. 08, p. 116).[15] But even under such assumptions Falstaff's rate of return would have been well below the approximate 13.2% rate of return it earned in 1964 (computed from GX 3-f).

To achieve this marginal return, Falstaff would have had to sell 850,000 barrels of beer, capturing 13% of the New England beer market in 1965[16] and becoming the third largest seller of beer in a market, the competition in which was characterized by the president of Falstaff as "dog eat dog" (Tr. 09, p. 131).

In the light of this uncontradicted evidence,[17] the govern-

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[15] These assumptions were as follows:

1. That construction of a million barrel capacity brewery could have been completed within three years;

2. That the brewery would have operated for the first ten years at 85% of capacity and at 100% capacity during the next 40 years;

3. That the cost of construction would have been only $20 per barrel capacity; and

4. That Falstaff would have received $1.16 profit on each barrel produced, which margin of profit was in line with the margin achieved by Falstaff during the four years previous to the acquisition (Tr. 08, pp. 115-117).

[16] Computed on the basis of the figures contained in DX F.

[17] In passing, we note that the government requested and was granted permission on two occasions to have government staff economists sit with counsel (Tr. 08, p. 41; Tr. 13, p. 2). These economists did not testify.

ment's assertion that Falstaff would probably have entered the market by the construction of a brewery was not only unproved but was without any basis.

*Falstaff was not a potential entrant by means of a "toehold" acquisition.* We do not concede the legitimacy of the "toehold" theory in a section 7 case. Regardless of the validity of the "toehold" theory and accepting it *arguendo* as far as this motion is concerned, the government was required to establish that it was *probable* that Falstaff would enter the market in that manner. (*See* pp. 5-6, *supra.*)

The government was content to rest its case on this issue upon the facts that (a) a number of acquisitions were made by Falstaff between 1933 and 1958 (Tr. 06, pp. 90-99; GX 2, pp. 2-7); (b) there were three independent brewers with plants in New England, two with a capacity of 100,000 barrels per year, the other with a capacity of 750,000 (GX 1, ¶¶ 8 and 10); (c) overtures had been made to Falstaff by two of these brewers [18] (Tr. 13, pp. 19-22); and (d) Falstaff had received unsolicited expressions of interest from thirty individuals or firms in becoming distributors of Falstaff beer [19] (GX 9). The government offered no evidence of the capacity of any of these individuals or firms to provide effective distribution. There was affirmative and credible evidence offered by the appellee (which it seems clear the court below accepted as credible) that these brewers lacked effective distributor organizations (Tr. 09,

[18] The government suggests that Falstaff's "attempted" acquisitions of Liebmann & Ballantine are evidence of Falstaff's determination to enter the market through the purchase of a brewer (Jurisdictional Statement, n. 9, at p. 7). To the extent this implies that Falstaff initiated negotiations, it is plainly wrong and without support in the record (Tr. 07, pp. 77-78; 93-94). Furthermore, Narragansett contacted Falstaff and not vice versa (Tr. 09, pp. 115-117; Tr. 14, pp. 7-8).

[19] Of those 30 inquiries, only 19 came from persons already distributing beer in the New England market (GX 9).

p. 106). The essential precondition to entry in the New England beer market in any fashion is an effective distributor organization (Tr. 08, p. 107).

Nor did the government produce evidence that the brewing facilities or the capacity of any of these brewers to operate efficiently was economically attractive to any acquisitor. The government proceeds from this evidence to assert that such a "toehold" acquisition offered Falstaff adequate "economic incentive," leaving a gaping hole between the evidence which it offered and the conclusions which it asks this Court to accept (Jurisdictional Statement, pp. 10, 12, 13).

The record is clear that these three small brewers did not have sufficient brewing facilities or the capacity to be operated efficiently (Tr. 13, p. 22). By the government's own admission, "A New England plant would, to be compatible with efficient operation, require a capacity of at lease [*sic*] one million barrels [per year]." (Jurisdictional Statement, n. 15, at p. 14.) Thus, the government is demanding that Falstaff purchase an inefficient brewer in order to gain entry into the market without demonstrating either that Falstaff would gain economic advantage thereby or that there was any economic incentive for Falstaff to make such acquisition.

*Falstaff was not "waiting in the wings" and its alleged presence at the edge of the market did not confront the existing sellers with any threat of entry either "independently" or by "toehold" acquisition.*[20] The third and last alternative left to the government to prove the elimination of potential competition was that the merger deprived the New England beer market of the pro-competitive effect of Falstaff's presence at the edge of the market. But as

[20] This theory was alluded to by the government at trial (Tr. 07, pp. 60-61) but is not pressed in its Jurisdictional Statement.

the late Justice Harlan said, concurring in *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, at 593-594 (1967):

> "... [E]conomic theory teaches that potential competition will have no effect on the market behavior of existing firms unless *present market power is sufficient to drive the market price to the point where entry would become a real possibility.* So long as existing competition is sufficient to keep the market price below that point, potential competition is of marginal significance as a market regulator. Thus in a conglomerate or product-extension case, where the effects on market structure which are easiest to discover are generally effects on the 'condition of entry,' an understanding of the workings of the premerger market cannot be ignored, *and, indeed, is critical* to a determination whether the visible effects on 'condition of entry' have any competitive significance." (Emphasis added.) (Footnote omitted.)

The government's proof on the condition of the premerger market consisted of statistics relating to "market concentration" (GX 1, Exs. O-Z). Standing alone, such statistics are not determinative of the degree of competition (Tr. 08, pp. 93-96; n. 25, *infra*). The objective evidence of the competitive conditions in the market is a better barometer. The record contains evidence of product improvements, packaging innovations and market share instability, all of which tend to reflect the intense competitive situation in the market (Tr. 08, pp. 100-102; GX 1, Exs. O-Z; DX F and H). In addition, the seven largest brewers by sales in the country were selling in that market prior to the merger and no brewer or combination of brewers was able to materially increase the price of beer during a period of rising costs (Tr. 08, pp. 101-102).

Because of this high level of competition, the market was not one which could have been "threatened" with entry by Falstaff.[21]

The government was unable to demonstrate, as it did in *United States* v. *El Paso Natural Gas Co., supra,* 376 U.S. at 655, that Falstaff's actions had some effect on the price of beer or the level of competition in New England. To the contrary, the evidence established that Falstaff in 1964 had no effect on the level of competition in the New England beer market (Tr. 09, p. 26), and further that at least one of its "possible" competitors did not consider Falstaff a competitive threat[22] (Tr. 14, pp. 10-11).

Contrary to the government's claim, therefore, Falstaff was not "waiting in the wings."

*The government failed to prove that competition would probably be lessened by Falstaff's acquisition of Narragansett.* The ultimate burden on the government, here as in any section 7 case, is to establish that the merger will probably have a significant adverse impact on competition.[23] If the government had been able to prove that Falstaff was a potential competitor in the market, or alternatively that its mere presence had some beneficial impact on the degree of competition in the New England market, it

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[21] At the time of the acquisition, the boundaries of Falstaff's markets insofar as these boundaries are relevant, were western Ohio and Richmond, Virginia. Except for insignificant sales in the District of Columbia, Falstaff did not sell any beer at any place closer to New England (Tr. 09, p. 115).

[22] Carl Haffenreffer, Vice-President and Director of Marketing for Narragansett prior to 1965, put it as follows:

> "We certainly didn't consider them [Falstaff] any threat to us. We had much greater threats to concern ourselves with. Certainly, at that distance, they were no threat because of the transportation costs." (Tr. 14, pp. 10-11.)

[23] S. Rep. No. 1775, 84 Cong., 1st Sess. 1950, U.S. Code Cong. and Ad. News, vol. 2, p. 4298; *United States* v. *Pabst Brewing Co., supra,* 384 U.S. at 562 (concurring opinion of Justice Fortas).

would have remained for it to establish the likelihood and substantiality of an adverse competitive effect resulting from the merger.

The government did not produce any evidence bearing on the adverse effect,[24] except for evidence of "concentration" which has little or no probative value in measuring the level of competition.[25]

In measuring the merger's effect on competition, the trial court had to consider whether (a) the merger led to increased concentration in the market, or (b) as a result of the merger, Falstaff increased its market power, *i.e.*, control over prices.[26] The post-acquisition evidence[27] reveals that since the merger, beer prices have remained constant, relative to costs (Tr. 08, p. 109). Had Falstaff been able to exert any control over prices, it would have used that control to increase Narragansett's share of the New Eng-

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[24] There is no *per se* rule of illegality in cases involving market extension mergers. *See* Anti-Trust Developments, 1955-1968, A Supplement to the Report of the Attorney General's National Committee to Study the Anti-Trust Laws (1968), at pp. 86-87;

[25] It is true that concentration may be a signal of possible deviation from competitive behavior but further study is required in order to ascertain the actual existence of any deviation from competitive norms (Tr. 09, 50-51).

[26] These alternative tests have been suggested as measures against which to judge the effect of "geographic extension mergers" on competition in any market. *United States* v. *First National Bank of Jackson*, 301 F. Supp. 1161, 1189-1190 (S.D. Miss. 1969). The instant merger is a "geographic extension merger" in that it involved two firms producing a similar product in separate geographical markets in which they were not direct rivals. *Id.* at 1190.

[27] The government objected to the admission of post-acquisition evidence and this objection was overruled (Tr. 08, pp. 37-41). The district court's ruling on the objection was proper. See *e.g.*, *United States* v. *Pabst Brewing Co.*, *supra*, 384 U.S. at 550-551; *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592 (1965).

land market or its profits. To the contrary, since 1964, the year preceding the merger, Narragansett's share has fallen from 21.5% to 15.5%, and its profits have declined (DX F and H; Tr. 09, pp. 25-26, 110; App. A and B).

The record in this case supports the finding below that the merger, if it had any effect on competition, did not have the effect of lessening (substantially or otherwise) the highly intense competition that characterizes the New England beer market.

## Conclusion.

The appellee moves this Court to affirm the judgment below on the grounds that the question presented is unsubstantial and that the judgment does not warrant review. *Chicago, Rock Island & Pacific Railway Co.* v. *Devine*, 239 U.S. 52, 54 (1915); *Bodkin* v. *Edwards*, 255 U.S. 221, 223 (1921).

Respectfully submitted,

MATTHEW W. GORING,

JAMES S. McCLELLAN.

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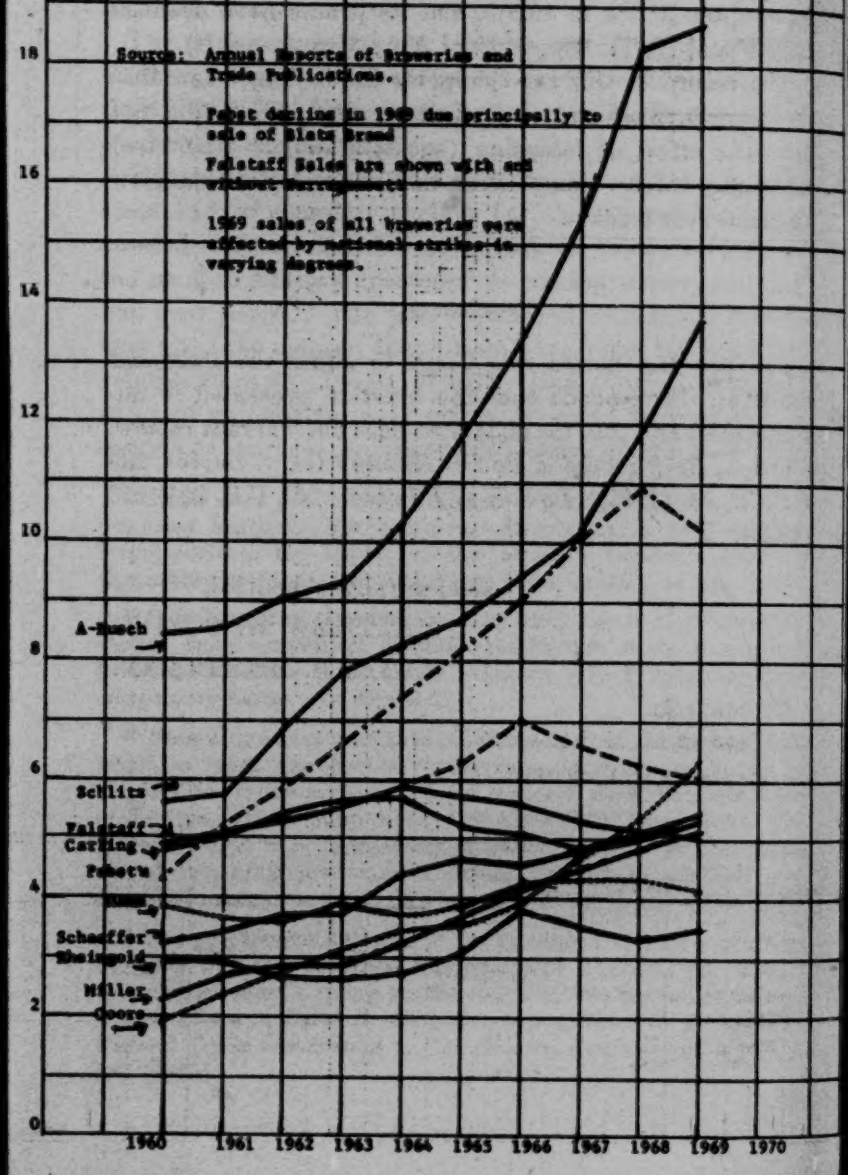
JEROME M. McLAUGHLIN,

STEPHEN J. CARLOTTI.

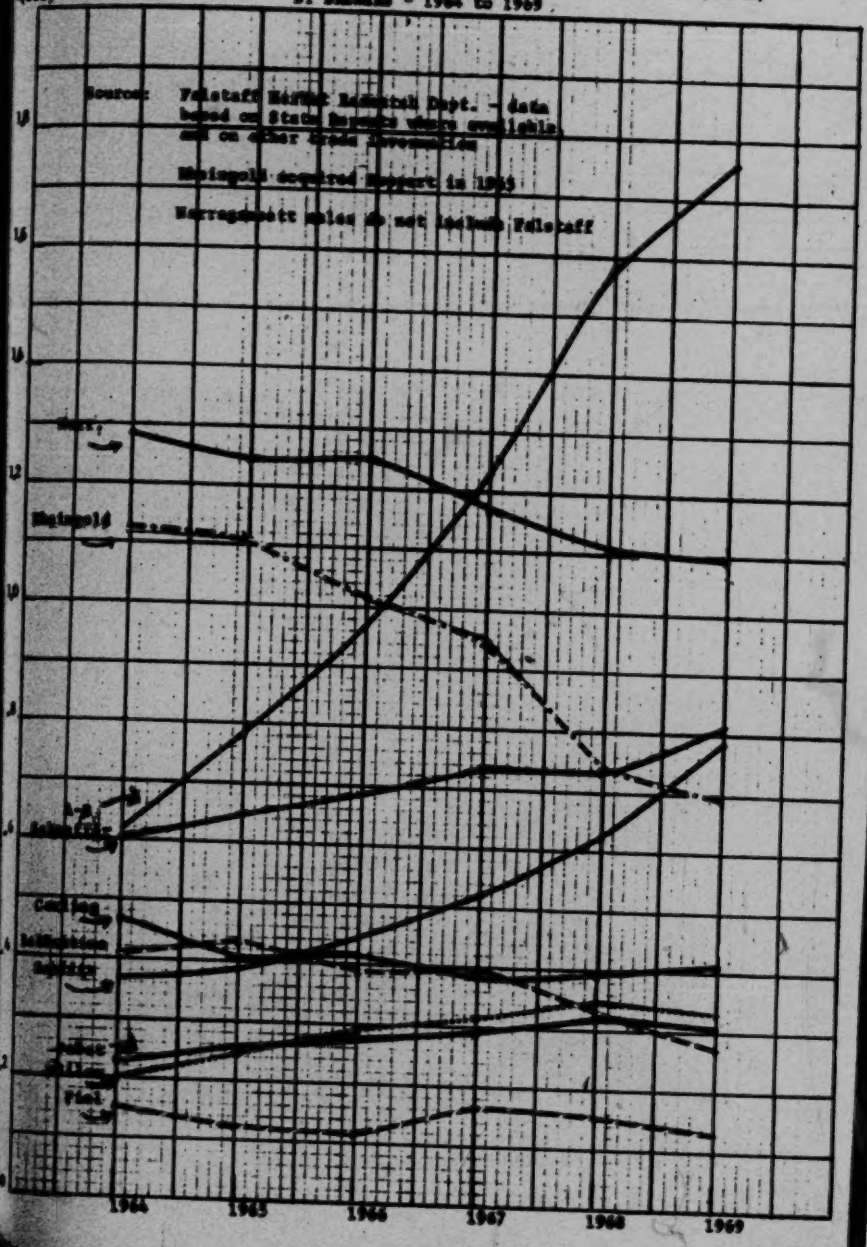
NATIONAL BARREL SALES
BY BREWERS - 1960-1969

APPENDIX A (DX G)

(Each Line = 100,000 barrels)



NEW ENGLAND BARREL SALES APPENDIX B (DX H)
BY BREWERS - 1964 to 1969



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# In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-873

UNITED STATES OF AMERICA, APPELLANT

*v.*

FALSTAFF BREWING CORPORATION AND NARRAGANSETT BREWING COMPANY

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the district court (J.S. App. A, pp. 18-23) is reported at 332 F. Supp. 970.

### JURISDICTION

The judgment of the district court dismissing the government's complaint (J.S. App. B, p. 24) was entered on October 7, 1971. A notice of appeal to this Court was filed on December 3, 1971 (J.S. App. C, p. 25; App. 585). Probable jurisdiction was noted on February 28, 1972 (405 U.S. 952). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act (15 U.S.C. 29). *United States* v. *Pabst Brewing Co.*, 384 U.S. 546.

## QUESTION PRESENTED

Whether the trial court applied an erroneous legal standard in holding that the acquisition by the fourth largest brewer in the United States of the largest brewer in New England did not violate Section 7 of the Clayton Act by eliminating the potential competition of the acquiring firm.

## STATUTE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

* * * * *

## STATEMENT

The United States instituted this civil antitrust case in the United States District Court for the District of Rhode Island alleging that the acquisition in 1965 of the Narragansett Brewing Company ("Narragansett") by the Falstaff Brewing Corporation ("Falstaff") violated Section 7 of the Clayton Act (15 U.S.C. 18). The theory of the suit was that potential competition in the New England beer market may be

substantially lessened by the acquisition. After a trial on the merits, the district court held that the acquisition did not violate Section 7 (J.S. App. A, pp. 18–23).

### A. THE NEW ENGLAND BEER MARKET

The product market in this case is beer; the geographic market is the six New England states.[1] During the past decade the beer industry in these states has both grown in sales' volume and increased in concentration.

In the four years preceding Falstaff's 1965 acquisition of Narragansett, beer sales in New England increased approximately 9.5 percent (computed from App. 409–414; computed from GX 1, O–Z),[2] from just under 5.5 million barrels in 1960 to more than 6 million barrels in 1964. During this period the beer market there also became more concentrated. In 1960, the eight largest sellers in New England accounted for approximately 74 percent of all beer sales; by 1964, they accounted for 81.2 percent (App. 167, 575;

[1] The parties stipulated for the purposes of this case that the production and sale of beer was a line of commerce and that New England was a section of the country within the meaning of Section 7 of the Clayton Act (App. 390; GX 1, p. 2). In New England, as elsewhere in the United States, the production of beer is subject to the federal alcohol tax; however, entry into the market is not regulated by the federal or state governments, although the states have varying packaging and labelling requirements. See the Brewer's Almanac, 1965, p. 88–89.

[2] "App." references are to the printed appendix in this Court; "GX" references are to government exhibits introduced in the district court; "DX" references are to defendants-appellees' exhibits in the district court.

GX 30).[3] Approximately 50 percent of the 1960 sales were made by the four largest sellers in New England; by 1964, their share of the product market was 54 percent; and by 1965, the year of acquisition, it was 61.3 percent (App. 168, computed from App. 581–586; computed from DX F).

This steady increase in concentration of beer sales was accompanied by a sharp decrease in the number of brewers operating plants in the region. In 1957, there were eleven breweries in New England; in 1964 there were only six (App. 392; GX 1, p. 4). The three smallest brewers were Hull Brewing Co. in New Haven, Connecticut, Diamond Spring Brewery in Lawrence, Massachusetts, and Dawson's Brewery in New Bedford, Massachusetts (App. 391–392, GX 1, pp. 3–4). Dawson's Brewery had a capacity of 750,000 barrels; Hull and Diamond Spring each had a capacity of 100,000 barrels (*ibid.*). Both Dawson's Brewery, which operated well below capacity, and Diamond Spring were interested in being acquired by a larger brewer and suggested such acquisition to Falstaff (App. 324–325).

Seven of the nation's ten largest brewers sold beer in New England.[4] Falstaff was the largest of the three remaining which did not. The other two were

[3] In 1964, the eight leading sellers in descending order of sales were: Narragansett, Rheingold, Anheuser-Busch, Schaefer, Carling, Ballantine, Schlitz and Pabst (App. 590; DX H). The Rheingold figures from 1964 on include sales by Ruppert, a brewer which Rheingold acquired in 1965 (App. 208–209).

[4] The firms were: Anheuser-Busch, Schlitz, Pabst, Carling, Schaefer, Ballentine and Miller. Not all of them operated plants in the area, however.

Hamm and Coors (App. 406, 589, 590; GX 1, M; DX G and H), both of which were appreciably smaller than Falstaff, ranking eighth and ninth in national sales. These two brewers were located some distance from New England. Hamm's nearest plant was in St. Paul, Minnesota, approximately 1,385 miles from Boston; Coors' only plant was in Golden, Colorado, 2,000 miles from Boston (App. 406, 392; GX 1, M; GX 1, p. 4).

### B. NARRAGANSETT, THE ACQUIRED FIRM

Narragansett was the largest seller of beer in New England at the time of its acquisition (J.S. App. A, p. 20), as it had been for each of the five preceding years. Between 1960 and 1965, it had constantly expanded the capacity of its brewery (App. 379), and had itself acquired either the assets or the trademarks of several smaller brewers in and around the New England area.[5]

By 1964, Narragansett was selling 1,275,000 barrels, which was approximately 20 percent of all beer sold in New England (App. 406; GX 1, M; J.S. App. A, p. 20). The same year it ranked twenty-first in national sales, accounting for about 1.4 percent of all beer sales in the United States (computed from App. 406; computed from GX 1, M). Its net sales and net profits,

[5] In 1961, Narragansett acquired the trademarks and trade name of the Krueger Brewing Company of New Jersey (App. 379; GX 5, 17); in 1964 it acquired the assets of the Haffenreffer brewery in Boston (App. 377; GX 5, 17). At the time of the latter acquisition, Narragansett had already acquired the assets or trademarks of two other New England brewers: Croft in Boston, and Hanley in Rhode Island (App. 379).

which in 1960 were $17.2 million and $417,284, respectively (App. 452–453; GX, p. 10). had increased by 1964 to record levels of $25.2 million and $713,083, respectively (App. 452–453; GX 5, p. 10).

The company operated a modern and efficient plant in Cranston, Rhode Island, with an annual production capacity of 1.5 million barrels (App. 576; DX A, p. 11). It had a good distribution system, built upon contracts with wholesale distributors. As was the general practice in the New England beer business, these contracts were not exclusive, and distributors frequently handled more than one company's beer. Narragansett from time to time changed distributors (J.S. App. A, pp. 20–21; App. 383–384).

C. FALSTAFF, THE ACQUIRING CORPORATION

Falstaff was at the time of the acquisition the fourth largest producer of beer in the United States (App. 588; DX F, p. 8). Its 1964 production was 5.8 million barrels, or 5.9 percent of the nation's production (computed from App. 588; computed from DX F, p. 8).

Starting in 1933 with a 100,000 barrel plant in St. Louis, Missouri, the company grew steadily by acquiring and expanding weak or failing breweries (App. 419–420; GX 2, pp. 6–10; and see App. 324). As of January 1965, Falstaff operated eight plants* and sold beer in thirty-two western, mid-western and southern states, sixteen of which it entered after 1950 (App. 426, 423–426; GX 2, p. 11, pp. 6–10). The company did not then sell in the Northeast.

*Subsequent to the filing of this suit, Falstaff closed two of its breweries, and thus at the time of trial it operated six plants, plus the former Narragansett plant (DX C, p. 6).

Falstaff's operations increased in size and profitability during the decade prior to its acquisition of Narragansett. Between 1955 and 1964, its net sales increased from $77 million to $139.5 million, and its net income increased from $4.3 million to $7 million (App. 441; GX 3F, C). A good credit rating through the years enabled it to finance all of its expansion projects. In 1964, the company planned a ten-year, $35 million program to expand its existing plants, apart from any acquisitions it might make (App. 48, 149, 154).

Falstaff markets its beer through two distribution channels: company-owned branches and wholesale distributors. In those cities where it has plants,[7] and in much of California, it distributes its product through company branches (App. 455, GX 5, p. 5). While the branches handled only about 20–25 percent of the company's sales in the early 1960's, their profit-margin per barrel was significantly higher than the profit obtained from distributor sales (App. 45, 551; GX 5, p. 13; GX 10, 65). Nevertheless, most of Falstaff's volume was sold through distributors.[8] The company had built up a strong distributorship system by stimulating public demand for its beer with extensive and effective advertising and by providing distributors with a quality product at a price which allowed a good

[7] Falstaff had two plants at the time of the acquisition in St. Louis, Missouri, and one each in Omaha, Nebraska; New Orleans, Louisiana; San Jose, California; Fort Wayne, Indiana; El Paso, Texas; and Galveston, Texas (App. 425, GX 2, p. 11).

[8] Falstaff in 1965 had 600 distributors; only 150 of these handled Falstaff products exclusively (App. 455; GX 5, p. 13).

markup (App. 437, 440–441; GX 3B, p. 8; GX 3F, pp. 10–12).

### D. FALSTAFF'S DECISION TO ENTER THE NORTHEAST

Notwithstanding Falstaff's consistent growth in the decade prior to its acquisition of Narragansett, the company encountered increasingly strong competition during the 1960's from the "national brewers"—*i.e.*, Anheuser-Busch, Schlitz, Pabst, and Miller (App. 444; GX 5, p. 2; and see App. 39, 85, 247–248)—which were selling their products in all of the significant markets in the country (App. 122).[9] National brewers possess important competitive advantages; they are able to advertise on a nation-wide basis, and their beers have greater prestige than regional or local beers (App. 86).[10]

The Falstaff management realized that for the company to compete effectively with the four national brewers it must sell nationally by entering the Northeast (App. 541–542; and see App. 122, 146–147).[11] In

[9] Thus, while total beer sales in the United States increased 10.9 percent between 1960 and 1964, the national firms increased their sales 40.2 percent (computed from App. 588; computed from DX F, p. 8). In 1960, the national firms had 23 percent of beer sales in the United States; by 1964 their share had increased to 29.8 percent (*ibid.*). During the same period Falstaff also grew, but not as rapidly; its sales increased 15.6 percent between 1960 and 1964 (*ibid.*).

[10] National brewers also have the advantages of being less seriously affected by bad weather or labor difficulties in any particular region (App. 87).

[11] Falstaff's president testified that the company had for some time wanted to enter New England as part of its interest in becoming a national brewer (App. 295; see also App. 101–102).

1958, Falstaff had commissioned Arthur D. Little, Inc., a management consultant firm, to study "actions Falstaff should take to maximize its profit in the years to come" (GX 10, transmittal letter). Following a comprehensive review of the company's operations, marketing, growth potential, financing and planning, the Little firm, in its report completed in 1960, recommended, among other things, that Falstaff become a national brewer by entering those significant remaining areas of the country where it did not then market its product, particularly the Northeast (App. 539–541; GX 10, pp. 11, 14).

Specifically, the report recommended that Falstaff enter the East Coast market in 1965 by building a brewery (App. 543–544).[12] The Little report carefully reviewed cost estimates aimed at increasing both the amount of earnings and the ratio of earnings to net worth, and it concluded that the advantages of building a plant exceeded those of buying one (App. 558).[13] The study stated that "[t]here appears to be ample reason * * * for building rather than buying * * * [and] that major new market entrances need not be predicated on the availability of a brewery Falstaff could purchase" (App. 558). The report also pointed out that it would be more profitable for the company

[12] The Little study recommended that Falstaff construct its new plant near Baltimore (App. 554). It also recommended that Falstaff enter the Chicago and Detroit markets within two years (App. 542).

[13] This recommendation to build rather than buy was not categorical; the report noted that there might be exceptional situations where it would be more beneficial to buy than build. It also pointed out that entry by building eliminated worries of adverse antitrust action by the government (App. 558).

to distribute its beer through branch operations rather than by sales through independent distributors (App. 542).

Falstaff thereafter made efforts to enter by acquisition the beer market in the Northeast. Between 1962 and 1964, it tried unsuccessfully to acquire two large brewers located in the New York City area, Liebmann and P. Ballantine & Sons, both of which sold significantly in New England (GX 22, 28, 29).[14] In early 1964, Falstaff sent its special project coordinator to the Massachusetts and New York plants of Piel Brothers, another large brewer, with a view toward possible acquisition of those firms (App. 49, 129). The company also had discussions with executives of Genesee of Rochester, New York, concerning acquisition of that firm (App. 76–77).

During this period, Falstaff also kept on file letters, indexed by state, from distributors and potential distributors in New England who were interested in handling Falstaff beer should the company enter the New England market (App. 470–535; GX 9).

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[14] Liebmann, the brewer of Rheingold beer, was ninth in national sales in 1962 and tenth in 1963 (App. 404, 405); Ballantine was sixth in national sales in 1963 and seventh in 1964 (App. 405, 406). On March 6, 1972, it was announced that Falstaff had agreed to purchase Ballantine's trademarks and tradenames, as well as certain of Ballantine's accounts-receivable and equipment. "Wall Street Journal", p. 9, col. 1-2, March 6, 1972.

### E. THE PROCEEDINGS BELOW

On May 26, 1965, Falstaff agreed to acquire Narragansett for approximately $19,500,000.[15] Before the acquisition was accomplished, however, the United States, on July 13, 1965, filed the present suit against Falstaff and Narragansett, alleging that the acquisition would violate Section 7 of the Clayton Act because its effect may be substantially to lessen potential competition in the production and sale of beer in the New England market.[16] The district court denied the government's motion for a temporary restraining order and a preliminary injunction, and, on July 15, 1965, the acquisition was consummated (J.S. App. A, p. 19). On August 16, 1965, Falstaff agreed to operate Narragansett as a separate, wholly-owned subsidiary until otherwise ordered or permitted by the court (App. 11–12), and, on September 22, 1965, the court dismissed the complaint as to the acquired firm, Narragansett (App. 1–2).

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[15] Falstaff, in exchange for all of Narragansett's property and assets, paid $17,500,000 in cash, $2,000,000 in Falstaff stock, and assumed Narragansett's debts and liabilities (App. 446; GX 5, p. 3). The sale was arranged through the Haffenreffer family who controlled Narragansett and owned 60 percent of its stock (App. 444; GX 5, p. 1). They wished to escape increasing competitive pressure and to provide diversity and security for their personal estates (J.S. App. A, p. 21).

[16] The complaint also charged that the acquisition violated Section 7 by substantially lessening potential competition in the production and sale of beer generally and by increasing industry-wide concentration in the production and sale of beer. After the parties stipulated on December 23, 1969, that the line of commerce was the sale and production of beer and that the relevant section of the country was New England, the United States did not press these additional charges.

Following a trial on the merits, the district court held that the government had failed to prove that Falstaff was a potential entrant into the New England beer market (J.S. App. A, p. 23). Without making any detailed findings, the court rested its conclusion on the subjective intent of Falstaff's management. "[T]he credible evidence establishes beyond a reasonable doubt," the court stated (J.S. App. A, p. 22), "that the executive management of Falstaff had consistently decided not to attempt to enter [the New England] market unless it could acquire a brewery with a strong and viable distribution system such as that possessed by Narragansett." Management "had carefully considered possible alternatives" for entry, the court found (J.S. App. A, p. 22–23), but had determined that none of these would be reasonably profitable.

In addition, the district court held that both before and after the acquisition there had been vigorous competition in the New England beer market (J.S. App. A, p. 21). It pointed to the fact that, since the acquisition, Narragansett's share of the market had declined while the market shares of Anheuser-Busch and Schlitz had increased (J.S. App. A, p. 21). On this basis, the court concluded that it was "not probable" that Falstaff's acquisition of Narragansett may substantially lessen competition in the New England beer market (J.S. App. A, p. 23).[17]

[17] The court added that in any event the acquisition was procompetitive because it would enable Narragansett to compete more successfully in New England against the national brewers (J.S. App. A, p. 23).

SUMMARY OF ARGUMENT

A. The competitive role played by an established firm on the edge of a concentrated market, with both the economic incentive and the financial capability to enter independently as a substantial competitor, can be significant. Such a firm represents not only a potential source of market deconcentration through future *de novo* entry; it also is in the position, as a significant potential competitor, to be an external influence on the conduct of those firms that are already in the market. Accordingly, the effect of its elimination from the edge of a concentrated market, through its acquisition of a large market share, "may be substantially to lessen competition" in violation of Section 7 of the Clayton Act. Indeed, where the acquiring firm is one of the few remaining potential competitors having the incentive and capability to introduce a new competitive factor into the market, such an acquisition may have no less serious anticompetitive effects than one that eliminates actual competition.

B. It is, therefore, essential to the preservation of a competitive market structure that those firms which are significant potential competitors be accurately and reliably identified. The determination should depend upon a careful analysis of objective economic evidence, directed toward the nature of the particular market, the potential entrant's financial capabilities, its economic incentive for expansion, and the reasonable prospects for making such expansion a successful venture. See p. 25, *infra*.

In the present case, the district court failed to consider such objective criteria. Rather, in assessing the

acquiring firm's role as a potential entrant into the New England beer market, it relied exclusively upon statements by that firm's management disavowing any intent to have Falstaff enter the market other than by the acquisition of Narragansett, the leading seller of beer in New England.

Such subjective evidence should not control the appraisal under Section 7 of potential entry. Generally, the motives and intentions of corporate management with respect to business expansion are shaped by a desire to maximize profits; little, if any, consideration is given to Section 7's purpose to preserve the industry structure most conducive to competition. Moreover, once a decision to enter by acquisition is made, corporate officials are committed to defend it. Thus, under a subjective standard, a court is compelled to make a judgment of economic probabilities on what is bound to be self-serving testimony. This introduces a highly uncertain factor into the administration of Section 7. The antitrust consequences of any acquisition would be largely unpredictable both to the businessman and to the Government.

To be sure, reliance on objective, rather than subjective, evidence as a basis for identifying a firm as a potential independent entrant does not achieve absolute certainty. But by basing the potential competition determination under Section 7 on whether, under all the circumstances, future independent entry by the acquiring firm would be a reasonable choice for prudent management, if entry by large acquisition is not available, the "statutory requirement of reason-

able probability" (*United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 175) is fully satisfied.

C. Applying that standard in the present case, Falstaff was at the time of the 1965 acquisition a potential entrant into the New England beer market, notwithstanding subjective statements by its management suggesting otherwise. New England had been undergoing significant economic growth, making it attractive to new entry; Falstaff was one of the few breweries outside the area with the ability to enter as a significant competitor in the market; and Falstaff had shown substantial economic incentive to expand into the New England area.

D. The effect of the elimination of Falstaff as a significant potential entrant through the purchase of the largest brewer in the area may be substantially to lessen competition in the New England beer market. That market is highly concentrated. Falstaff's entry into it in a manner that introduced no new competitive factor left New England without any significant competitors on the outside having the potential for meaningful entry. Moreover, it removed the possibility that Falstaff would itself come into New England either independently or by a toehold acquisition. Falstaff had the financial capability to enter by either route. It also had both the economic resources and the experience to establish and maintain an effective system for distributing its beer in the area, either through its own branches or through independent distributors.

## ARGUMENT

### THE EFFECT OF THE PROPOSED ACQUISITION MAY BE SUBSTANTIALLY TO LESSEN COMPETITION IN THE NEW ENGLAND BEER MARKET BY ELIMINATING THE POTENTIAL COMPETITION THAT THE ACQUIRING FIRM PROVIDED IN THAT AREA

#### A. AN ACQUISITION THAT ELIMINATES POTENTIAL COMPETITION IN THE BEER INDUSTRY MAY SUBSTANTIALLY LESSEN COMPETITION WITHIN THE MEANING OF SECTION 7 OF THE CLAYTON ACT

Section 7 of the Clayton Act, as amended in 1950, is intended to bar mergers which may further contration or have other anticompetitive effects in the structure of American industries. See *United States* v. *Pabst Brewing Company,* 384 U.S. 546, 552; *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158, 170–171; *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 311–322. Industry concentration tends toward an oligopolistic market structure. "As that condition develops, the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge." *United States* v. *Alcoa,* 377 U.S. 271, 280. See also *Federal Trade Commission* v. *Procter & Gamble Co.,* 386 U.S. 568; *United States* v. *Pabst Brewing Company, supra.*

The structure of a particular industry is determined in part by the total number and size distribution of firms within a particular geographic market—*i.e.,* the actual competitors—which are manufacturing products regarded by consumers as relatively interchangeable. See *e.g.,* Bain, *Industrial Organization,* 7 (2d ed. 1968); Scherer, *Industrial Market Structure and Economic Performance,* 4 (1970 ed.). But the ability of outside firms dealing in the same product lines—*i.e.,*

the potential competitors—to enter the relevant market independently also can exert considerable influence on industry structure. See, *e.g.*, Bain, *Industrial Organization*, 8 (2d ed. 1968).[18]

Where a market is highly concentrated—where a few firms account for most or all of the business—there is, as this Court observed in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 363, a real danger that those firms will find their interests best served by tacitly renouncing vigorous competition, by adopting a policy of "live and let live." And see *United States* v. *Alcoa*, 377 U.S. 271, 280. In such a situation, it is the outside force of potential competition (*i.e.*, the threat of entry by strong firms outside the market either independently or by acquisition of a small firm already in the market) that often provides the most significant limitation on such an exercise of market power by the firms in the concentrated market.[19]

For this reason, the effect of a merger or acquisition which results in the elimination of a significant

[18] Professor Bain classifies the role of potential entrants under the heading of condition of entry into the market, which "determines the relative force of potential competition as an influence or regulator on the conduct and performance of sellers already established *in* a market." Bain, *Industrial Organization*, 8 (2d ed. 1968). See also Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1372–1373 (1965); Areeda, *Antitrust Analysis*, 517–518 (1970).

[19] "New entry can, of course, quickly alleviate 'undue' concentration. And the possibility of entry can act as a substantial check on the market power of existing competitors." *United States* v. *Phillipsburg National Bank*, 399 U.S. 350, 377 (Mr. Justice Harlan, dissenting).

potential competitor, especially where, as here, there are extremely few firms having the incentive and capability to introduce a significant new competitive factor into the market, "may be substantially to lessen competition," contrary to Section 7 of Clayton Act. *Ford Motor Co.* v. *United States,* No. 70–113, O.T. 1971, slip op. 4–6, decided March 29, 1972; *Federal Trade Commission* v. *Procter & Gamble Co.,* 386 U.S. 568; *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158; *United States* v. *Continental Can Co.,* 378 U.S. 441; *United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651. Indeed, such an acquisition may have no less serious anticompetitive effects than one that eliminates actual competition. Cf. *United States* v. *Penn-Olin Chemical Co., supra,* 378 U.S. at 168, 170–174.

In the beer industry, potential competition has particular significance. The market trend toward concentration in that industry has already been noted with some concern by this Court in invalidating a merger between actual competitors. *United States* v. *Pabst Brewing Company, supra,* 384 U.S. at 550–553. That trend alone suggests the importance of a potential entrant to the preservation of a competitive market structure. A brewer on the edge of a concentrated market having both the ability and incentive to enter may offer the only real possibility for deconcentration by future independent entry (see *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 365 n. 42); it also is an external factor that inhibits anticompetitive practices by those brewers already in the

market." See *United States* v. *Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal.), affirmed, 385 U.S. 37; *United States* v. *Standard Oil Co. (New Jersey)*, 253 F. Supp. 196 (D. N.J.); *United States* v. *Wilson Sporting Goods Co.*, 288 F. Supp. 543 (N.D. Ill.); and see *Ekco Products Co.* v. *Federal Trade Commission*, 347 F. 2d 745 (C.A. 7); *General Foods Corp.* v. *Federal Trade Commission*, 386 F. 2d 936 (C.A. 3), certiorari denied, 391 U.S. 919.

Moreover, sales in the beer industry depend largely on advertising and on product differentiation unassociated with inherent quality (see *United States* v. *Jos. Schlitz Brewing Co., supra*). The principal barrier to new entry into a particular beer market is, therefore, a financial one associated with promotional costs. When a brewer outside a concentrated market has the resources to enter independently and compete effectively through the media, its elimination as a potential *de novo* entrant, through its acquisition of a large market share, is especially relevant in assessing under Section 7 the effect of such an acquisition upon the competitive structure of the market in question. This Court so recognized in summarily affirming

[20] As this Court observed in *United States* v. *Penn-Olin Chemical Co.*, *supra*, 378 U.S. at 174: "'* * * [p]otential competition * * * as a substitute for * * * [actual competition] may restrain producers from overcharging those to whom they sell or underpaying those from whom they buy. * * * Potential competition, insofar as the threat survives [as it would have here in the absence of Penn-Olin], may compensate in part for the imperfection characteristic of actual competition in the great majority of competitive markets.'" See also Elzinga, "The Beer Industry," in Adams, *The Structure of American Industry*, 189, 202 (4th ed. 1971).

the district court's decision in *United States* v. *Jos. Schlitz Brewing Co., supra*, which invalidated under Section 7 several proposed acquisitions by Schlitz that would have eliminated significant potential competitors from the edge of the relevant beer market,[21] as well as eliminating actual competition.

B. THE DETERMINATION WHETHER THE ACQUIRING FIRM IS A POTENTIAL COMPETITOR DEPENDS ON THE OBJECTIVE FACTS RELATING TO ITS INDEPENDENT ENTRY INTO THE MARKET AND NOT UPON THE FIRM'S SUBJECTIVE STATEMENTS WITH RESPECT TO THE LIKELIHOOD OF SUCH ENTRY

In determining whether Falstaff was a potential competitor, the district court relied solely on statements by Falstaff's management that the acquiring firm had no intention of entering the New England market other than by a merger with a leading local brewer in the area. It pointed only to testimony of company executives that "possible alternatives" to the present acquisition had been "carefully considered" and rejected on the ground that they would not have

[21] Schlitz, the nation's second largest brewer, whose premium beer accounted for only a small percentage of the California market, attempted to acquire Burgermeister, a leading California popular-priced beer. The acquisition was invalidated under Section 7 on the ground that it would eliminate Schlitz as a potential entrant into the California market with its own popular-priced "Old Milwaukee" beer (253 F. Supp. 142). In the same case, the acquisition by Schlitz of a controlling interest in a large Canadian brewer, Labatt, and its United States subsidiary, General Brewing Co., both of which were significant potential competitors in California and in the western United States, was held to have anticompetitive effects in violation of Section 7 of the Clayton Act (253 F. Supp. at 138).

afforded "a reasonable probability of a profitable entry" into New England (J.S. App., p. 22). "[T]he executive management of Falstaff had consistently decided not to attempt to enter said market," the court found (*ibid.*), "unless it could acquire a brewery with a strong and viable distribution system such as that possessed by Narragansett."

The subjective motives and intentions of corporate management as to alternatives they might or might not have pursued with respect to a given market have never been accepted by this Court as a basis for concluding that a firm is not a potential entrant. Indeed, in *United States* v. *Penn-Olin Chemical Co., supra,* the Court, following a full review of objective evidence showing the capability and incentive of joint venturers to enter a market independently, held (378 U.S. at 175): "Unless we are going to require subjective evidence, this array of probability certainly reaches the prima facie stage. As we have indicated, to require more would be to read the statutory requirement of reasonable probability into a requirement of certainty. This we will not do." See also *Federal Trade Commission* v. *Procter & Gamble Co.,* 386 U.S. 568, 580–581.

For the concept of potential competition to be meaningful under Section 7, there must be some reliable and accurate means for ascertaining which firms are significant potential competitors. Reliance on management's stated preference as the determinative test is both unreliable and inaccurate.

Business decisions are necessarily and properly motivated by a purpose, fundamental to our free enterprise system, to maximize profits. The determination

to expand into new markets is made with a view toward immediate profit advantage; it does not depend on preserving the industry structure that is most conducive to competition. Given this, a voiced preference for entry by means of a substantial acquisition is not surprising. Almost always it is easier to enter a market by purchasing a large existing market share than by engaging in the hard competition that confronts a firm entering independently or through what is commonly referred to as a "toehold" acquisition."

But, merely because expansion by a large acquisition may be more profitable to the acquiring firm does not mean that the firm lacks the capability to enter a particular market independently. See *United States* v. *Standard Oil Co. (New Jersey)*, 253 F. Supp. 196, 220–223, 227 (D. N.J.). Management's subjective preference to maximize profits is thus not an accurate reflection of the competitive status of a potential entrant. If deemed controlling in the present context, it would effectively undermine the fundamental concept of Section 7, which is to insure that the profit motivation in our free enterprise system is directed into procompetitive channels. See, *e.g.*, *United States* v. *Pabst Brewing Company, supra.*

Moreover, the weight to be accorded such subjective evidence would depend essentially on the trial court's

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[22] "Toehold entry" means entry into a market by a new competitor through the acquisition of a small competitor already operating there. See *The Bendix Corp.* (FTC), 3 Trade Reg. Rep. ¶ 19,288, vacated and remanded on other grounds, *Bendix Corporation* v. *Federal Trade Commission*, 450 F. 2d 534 (C.A. 6); *The Stanley Works* (order of the Federal Trade Commission dated May 17, 1971), 3 Trade Reg. Rep. ¶ 19,646.

evaluation of the sincerity of officials committed to defend their management's decision. This introduces a highly uncertain factor into the administration of Section 7. Management officials, who naturally attempt to justify their corporate decision to enter a market by acquisition, are often unable to give disinterested, retrospective testimony about what their corporation would have done if it had not been able to consummate the acquisition.[23] Not infrequently, an acquiring firm which has been barred by antitrust proceedings from making a particular acquisition may turn to the more competitive method of market entry that it originally had declined to pursue.[24]

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[23] In another Section 7 case, for example, officials of Bethlehem Steel strongly insisted that unless Bethlehem were allowed to acquire Youngstown Steel, the company would never enter the midwest steel market. The district court ruled against the merger. *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y.). Bethlehem then entered the market independently. See Moody's *Industrial Manual*, 1966, p. 2861.

[24] For example, in 1960 the United States challenged the acquisition by Anheuser-Busch Co. of a large brewing facility in Miami, Florida, contending that the acquisition would eliminate actual and potential competition. Anheuser-Busch agreed to a consent decree providing for divestiture. *United States* v. *Anheuser-Busch, Inc.*, 1960 Trade Cases, ¶69,599. Following the divestiture, Anheuser-Busch is reported to have "forgone any policy of acquiring rival brewers and has since undertaken an extensive program of building new plants in Florida and other locations." Elzinga, op. cit. *supra*, note 20, at p. 203.

Similarly, in 1961, Schlitz attempted abruptly to expand its small share of the beer market on the West Coast by merging with Burgermeister, rather than introducing its own popular-priced beer, see n. 21, *supra*. While the merger was being challenged in the courts, however, Schlitz developed other facil-

Subjective testimony as to corporate intentions and economic preferences is thus a particularly unreliable basis for decision under Section 7. If it were determinative, the outcome of each potential competition case would turn upon the vagaries of managerial attitudes and policies, without regard to economic probabilities. Businessmen would be unable to "assess the legal consequences of a merger with some confidence" (*United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 362). The antitrust consequences of an acquisition would lose that necessary element of predictability that this Court has recognized is so important in merger transactions which may involve many millions of dollars, the livelihood of large numbers of employees and even whole communities, and the public interest in the structure of a concentrated industry. See, *e.g., United States* v. *Topco Associates,* No. 70–82, O.T., 1971, decided March 29, 1972, slip op., p. 13, n. 10.

It is therefore essential, both to the purpose of Section 7 and to its efficient administration, that the role of a potential entrant on the edge of a concentrated market be assessed on the basis of a careful analysis of objective economic evidence, uninfluenced by what management might later subjectively claim to have "considered" or "decided" (J.S. App., p. 22). The situation "must be viewed functionally in the con-

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ities and today operates its own large brewery and warehouse in Los Angeles, California, 1971 Moody's *Industrial Manual,* p. 1174.

See also Brief for the United States in *United States* v. *First National Bancorporation, Inc. and First National Bank of Greeley,* No. 71–703, this Term, at pp. 32–34.

text of the particular market involved, its structure, history and probable future" (*United States* v. *Continental Can Co., supra,* 378 U.S. at 458). Whether, in that context, the outside firm may be a significant potential competitor should turn on objective factors: whether, considering the structure of the market, the putative entrant's financial capability to enter independently, its economic incentive to do so, and the reasonable prospects for making such an entry successful, there exists a basis for entry which would be reasonably acceptable to prudent management, if entry by acquisition of a large market share were not an available option.[25]

To be sure that standard does not reduce the potential competition determination under Section 7 to litmus test certainty. But the statute does not demand that it do so (see *United States* v. *Penn-Olin Chemical Co., supra,* 378 U.S. at 175); Section 7 requires only a determination of reasonable probabilities, not certainties. See, *e.g., Ford Motor Co.* v. *United States, supra,* slip op. at pp. 3–4, n. 4; *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 362–363; *Brown Shoe Co.* v. *United States, supra,* 370 U.S. at 323. Its purpose is to prohibit all acquisitions the effect of which "may be substantially to lessen competition."

Viewed in this light, reliance on objective criteria provides a predictable basis for assessing an outside firm's capabilities of independent entry. Moreover, such a standard affords a more accurate reflection of

[25] See Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin,* 82 Harv. L. Rev. 1007, 1024–1030 (1969).

the potential entrant's influence on the conduct of those firms already in the market. See, *e.g.*, *Ford Motor Co.* v. *United States, supra; United States* v. *Penn-Olin Chemical Co., supra.* Ordinarily, firms in the market will evaluate the competition of an established firm on the edge of the market on the basis of objective factors indicating the outsider's financial capacity and economic incentive to enter; rarely will they be aware of management's subjective preferences motivated by a desire to maximize profits.

Accordingly, we submit that the fundamental determination in potential competition cases must be based on an objective appraisal of the factors bearing on whether independent entry is preferable to no entry at all for a firm with the potential entrant's capabilities and incentives. The basic question is whether, considering all the circumstances, independent entry in the future is a reasonable choice for prudent management, if entry by large acquisition is not available. Where a concentrated market is growing, and profit expectations in it are good, an outside firm with the legal, technological and financial capabilities to enter must be viewed as a potential entrant if it would be reasonable for it to enter independently or by a toehold acquisition. Such a firm serves both as a future source of deconcentration and as a restraining influence on existing competitors.

### C. FALSTAFF IS A POTENTIAL ENTRANT INTO THE NEW ENGLAND BEER MARKET

Under the objective criteria we have outlined—as distinguished from the stated preference of Falstaff's

management to enter the New England beer market by acquisition of a local market leader upon which the district court relied—Falstaff was a potential entrant into the area. The objective evidence shows that (1) the New England beer market has been undergoing significant economic growth, making it attractive to new entry; (2) Falstaff was one of the few breweries outside the area with the ability to enter as a significant competitor in the market; and (3) Falstaff had substantial economic incentive to expand into the New England area.

1. *The New England beer market is attractive to new entry.*—In the early 1960's, the beer market in New England had undergone considerable economic growth. Barrel sales in the area increased from 1960 to 1964 almost ten percent (computed from App. 409–414; computed from GX1, O–Z). The experience of Narragansett, the acquired firm, during this period was typical. Its New England beer sales had grown markedly between 1960 and 1964 (App. 402–403; GX, I–L), and, according to its executive vice-president (App. 379), at the time of the acquisition the company was still growing. Its net sales and net income had increased progressively in the preceding four years, registering record figures in 1964 in both categories (App. 452–453; GX 5, p. 10).

The New England market was, therefore, attractive to outside brewers. It had, moreover, both the size and the capacity to sustain new entrants. Falstaff does not contend, nor did the district court find, otherwise.

2. *Falstaff was one of the few breweries that had the ability to enter the New England market in a*

*meaningful way.*—At the time of the acquisition, Falstaff was the fourth largest brewer in the country; it sold in all the major sections of the United States except the Northeast. Moreover, it, too, was growing. In the decade prior to its acquisition of Narragansett, the acquiring firm's net sales increased from $77 million to $139.5 million; its net income rose from $4.3 million to $7 million during the same period (App. 442; GX 3F, C).

Of the nation's ten largest brewers in 1964 (see pp. 4–5, *supra*), there were only two brewers, Hamm and Coors, besides Falstaff that did not sell in New England. Falstaff was the largest; its 1964 sales exceeded Hamm's by more than two million barrels and exceeded Coors' by almost two and a half million barrels (App. 588). That it had the financial resources to enter the New England market *de novo* or by a "toehold" acquisition is not seriously questioned (Motion to Affirm, p. 8). The company's financial position was strong and its credit rating was good (see Statement, *supra,* pp. 6–7). It had obtained financing for all its ventures in the past (App. 48), and, in 1964, Falstaff had planned a ten-year, $35 million program to expand its existing plants, apart from any acquisition it might make (App. 149, 154).

Falstaff argues that *de novo* entry would have been ill-advised because the return on its investment would have been unreasonably low (Motion to Affirm, p. 9). The contention is based on a calculated 6.7 percent return suggested by its expert witness, Dr. Horowitz, which he characterized as "inordinately low" and as

"a very, very poor investment indeed" (App. 239).[26] But, it does not follow from the fact that expansion could be accomplished by more profitable means that Falstaff lacked the ability to enter the New England market independently as a significant competitor. See *United States* v. *Standard Oil Co. (New Jersey)*, *supra*, 253 F. Supp. at 220–223, 227.

Moreover, the 6.7 percent figure is suspect. Even Dr. Horowitz recognized that the construction of a new plant in New England would make Falstaff a national brewer, and thus provide the company with system-wide incremental earnings which, when added to its New England earnings, would raise the plant's return above 6.7 percent (App. 287–288).[27] Furthermore, Dr. Horowitz' calculations are based upon an estimated profit figure of $1.16 per barrel, which was then the average profit being made by Falstaff at its older breweries (see n. 26 *supra*). It is not unlikely

[26] Dr. Horowitz's calculation was made on the basis of an estimated $20 million cost to Falstaff to construct a conventional million-barrel brewery in New England. He hypothesized a cost figure of $20.00 per barrel, and a profit per barrel of $1.16—which was Falstaff's average profit per barrel between 1960 and 1964 (App. 239)—on sales of 850,000 barrels per year for the first ten years, and of 1,000,000 barrels per year for the forty years thereafter (App. 238). Falstaff's contention (Motion to Affirm, p. 9) that a projected sales volume of 850,000 barrels per year would have required the company to obtain "13% of the New England beer market" is not well taken. Falstaff could have used the beer produced by this plant for sales anywhere in the Northeast area, both inside and outside of New England.

[27] Dr. Horowitz stated that he was unable to calculate the specific additional financial benefit that the New England plant would provide by making Falstaff a national brewer (App. 287–288).

however, that a newly constructed plant would yield a higher return. Both Anheuser-Busch and Pabst, for example, earned returns of better than $2.50 per barrel from their new plants in New England (App. 239–240).

At all events, the 6.7 percent estimated return from an entry *de novo* compares favorably with the projected return on investment under the Narragansett acquisition. Falstaff spent $19 million to acquire Narragansett, and Dr. Horowitz acknowledged that if the earnings of the acquired firm were to continue at their record 1964 level ($713,000), this would represent a return to Falstaff on its investment of only 3.7 percent (App. 288–289).

3. *Falstaff had substantial economic incentive to expand into the New England market.*—Faced in the late 1950's with stiff competition from national brewers (see Statement, *supra*, p. 8), Falstaff's management recognized that the firm's economic interests required expansion into the few remaining areas of the country where it was not then doing business. As early as 1960, the management consultant firm of Arthur D. Little, Inc., in a comprehensive study commissioned by Falstaff, recommended that the company enter the populous Northeast within five years (App. 541–542; GX 10, p. 14; and see App. 122, 146–147). In response, the company, as its president testi-

fied (*supra*, n. 11), began to explore possibilities for enterin gthe Northeast beer market.[28]

In 1962 and 1963, it made extensive efforts to acquire Liebmann, a New York City brewery with substantial sales in New England (App. 561–563; GX 22). When that proved unsuccessful, it attempted to purchase Ballentine of Newark, New Jersey, which was in 1964 the sixth largest seller of beer in New England (App. 589; DXG).[29] Failing there, Falstaff turned to the Massachusetts and New York breweries of Piel Bros. (App. 129), although again to no avail. In addition, the company maintained throughout this period files of letters, indexed by state, from distributors and potential distributors in New England who wished to handle Falstaff beer should it enter the New England market (App. 470–535; GX 9).

D. THE EFFECT OF THE ACQUISITION MAY BE SUBSTANTIALLY TO LESSEN COMPETITION IN NEW ENGLAND

This objective evidence, we submit, shows that Falstaff was a potential entrant into the New England market. Its elimination as such through its purchase of the largest brewer in the area may have the

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[28] Appellee asserts that the United States "wrongly equates" New England with the Northeast (Motion to Affirm, p. 5 n. 5). No effort has been made, however, to analyze the anticompetitive effects of the present acquisition in terms of any broader geographic market than the one stipulated by the parties, *i.e.*, the six New England states (App. 390; GX 1, p. 2). To the extent that entry into that geographic market satisfies Falstaff's economic need to do business in the Northeast, there is no reason to distinguish between New England and the Northeast.

[29] Falstaff was willing to pay $35.5 million for Ballentine (App. 573; GX 29, p. 1). In 1972, it acquired certain valuable Ballentine assets (see n. 14 *supra*).

effect of substantially lessening competition in the New England beer market.[30]

1. *The New England market was highly concentrated.*—At the same time that the beer market in New England was enjoying economic growth (*supra*, p. 3), it was becoming more concentrated. Between 1960 and 1964, the eight largest brewers operating in the area increased their market share from 74 percent to 81.2 percent (App. 167; GX 30). The four largest New England brewers had 54 percent of sales in 1960, and by 1965, their market share had grown to 61.3 percent (computed from App. 581–588; computed

[30] The district court's conclusion to the contrary was improperly based on post-acquisition evidence indicating that "since Falstaff's acquisition of Narragansett on July 15, 1965, there has been no diminution of the intensity and vigor of said competition" (J.S. App., p. 21). Such evidence, however, has never been considered conclusive in determining anticompetitive consequences of a merger or acquisition. As this Court stated in *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592, 598, "the force of § 7 is still in probabilities, not in what later transpired." It is, therefore, not particularly relevant to the Section 7 determination in this case that Narragansett's share of the beer market declined after the acquisition (J.S. App., p. 21). Compare *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 576–577. The sole question under the antitrust statute is whether, in assessing probabilities at the time of the acquisition in 1965, the structural changes in the New England beer market caused by the elimination of the acquiring firm as a potential entrant and by the removal of the acquired firm as an independent competitor were such as to warrant a conclusion that competition there *may* be substantially lessened. That question should not be answered, as the district court did here, principally on the basis of post-acquisition developments. See *United States* v. *Continental Can Co.*, *supra*, 378 U.S. at 463.

from DXF). Thus, at the time of the acquisition, the level of concentration in the New England market was even higher than the 58.62 percent market share of the four leading beer sellers in Wisconsin that concerned this Court in *United States* v. *Pabst Brewing Co., supra,* 384 U.S. at 551.[31] Compare also *United States* v. *Jos. Schlitz Brewing Co., supra,* 253 F. Supp. at 134, 159, 179.

In addition, during approximately the same period, the number of brewers which operated plants in the region had been cut almost in half. Of the eleven brewers in this category in 1957, there remained only six by 1964 (App. 392; GX 1, p. 4); and three of these were sufficiently small to be permissible toehold acquisition for a potential entrant (see p. 4 *supra*).

2. *The acquisition of Narragansett by Falstaff may substantially lessen competition by eliminating Falstaff as a potential competitor in the New England market.*—Given this high degree of concentration, Falstaff's acquisition of the leading beer distributor in the area, Narragansett, created a "reasonable likelihood" (*United States* v. *Penn-Olin Chemical Co., supra,* 378 U.S. at 171), or a "reasonable probability" (*id.* at 175; *United States* v. *Von's Grocery Co., supra,* 384 U.S. at 285 (Mr. Justice Stewart, dissenting)), that competition in the New England beer market would be substantially lessened. Section 7 "look[s] not merely to the actual present effect of a merger but instead to its

[31] Moreover, in *Pabst*, the eight leading beer sellers in the three-state market had 67.65 percent of sales, as compared with the 81.2 percent figure here.

effect upon future competition" (*United States* v. *Von's Grocery Co., supra,* 384 U.S. at 277).

As we pointed out earlier, when an established brewer outside a concentrated market enters that market by acquiring one of its local leaders, it eliminates itself as a significant factor that inhibits firm within the market from adopting "parallel policies of mutual advantage" (*United States* v. *Alcoa, supra,* 377 U.S. at 280) in disregard of local competitive conditions. Falstaff's acquisition of Narragansett left the New England beer market, which was fast becoming oligopolistic, without any significant competitors on the outside having the potential for meaningful entry (see *supra,* pp. 4–5). Since, moreover, the acquisition merely changed ownership of the leading firm in the area, no new competitive factor was introduced into the market.[33] Thus, the anticompetitive impact resulting from the elimination of Falstaff as a potential competitor was even more serious here than when two potential entrants combine to enter a market through a joint venture. In the latter instance, the loss of potential competition is counterbalanced by the creation of a new firm that actually enters the market. Compare *United States* v. *Penn-Olin Chemical Co., supra,* 378 U.S. at 170, 172–174.

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[33] The district court's statement, made without any findings, that the acquisition would have a procompetitive effect because it would enable Narragansett to compete more successfully with national brewers, finds little support in the record. That consideration is, in any event, not a basis for validating the acquisition. See *Ford Motor Co.* v. *United States, supra,* slip op. at 6–7; *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 370–371.

In addition, the acquisition eliminated the possibility for future deconcentration of the market that would result if Falstaff entered either independently or through a toehold acquisition of one of the small New England brewers. In view of the concentration in the beer industry and the increasing barriers to entry by new firms, "[t]he most promising source of new competition is that of the established brewer moving into a new geographic market." [13] The potential for such a move existed in this case, since, as we have shown, Falstaff had both the economic incentive to expand its operations into New England and the financial capability to do so by opening a new plant in the area or by acquiring a small existing plant and expanding it.

The company was financially capable of entering *de novo* by building a conventional million-barrel brewery in New England for roughly $20 million (App. 48, 154, 159).[14] Furthermore, it could have built a new brewery of less conventional design for even less than $20 million. Arthur D. Little estimated the cost of constructing such a plant, with a million-barrel

[13] Elzinga, "The Beer Industry," in Adams, *The Structure of American Industry*, 189, 202 (4th ed. 1971). The barriers to entry are principally the high-scale costs of production and the heavy promotional costs associated with introducing a new beer. *Id.* at 201–202.

[14] Falstaff's economic expert, Dr. Horowitz, testified that a cost of $20 per barrel was reasonable (App. 239), and indicated that a lower cost per barrel might be possible if a larger brewery were built (App. 238–239). The 1960 Arthur D. Little report estimated the cost of a conventional million-barrel brewery at $19,321,000 ($19.32 per barrel) (App. 556; GX 10, 14, 16; and see App. 239). The brewery could have been built in two or three years (*ibid.*).

capacity, to be $16 million ($15.93 per barrel) (App. 556; GX 10, p. 98).[35]

Nor was Falstaff limited to entering the New England market independently if it did not acquire Narragansett. It also might have made a "toehold" acquisition, *i.e.*, the purchase of a small brewery which is then expanded (see n. 22 *supra*). There were several breweries in the area, which could have provided such a base for operations. Both Hull Brewing Co. in New Haven, Connecticut, and Diamond Spring Brewery in Lawrence, Massachusetts, were sufficiently small to provide a toehold in the market; each had a capacity of approximately 100,000 barrels annually (App. 391–392; GX 1, pp. 3–4). Dawson's Brewery, in New Bedford, Massachusetts, which consistently operated well below its capacity of 750,000 barrels per year (*ibid.*), was another likely candidate. Indeed, both Diamond Spring and Dawson's had made overtures to Falstaff inviting acquisition (App. 324–325); and it is undisputed that Falstaff could have obtained the necessary financing for acquisition and expansion of any of these brewers (App. 48, 149).

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[35] Falstaff seeks to discount this evidence on the basis of a claim by its president (App. 323) that the company could not find satisfactory designs for two of the processes recommended in the Little report—outdoor fermentation and outdoor storage. But in 1964, Falstaff's chief of research and development reported that the company had succeeded in the engineering of outdoor storage tanks and praised their economic advantage (GX 17, pp. 7–8). Falstaff's Annual Report for the same year contained a prominent picture of six of these tanks under construction at one of its plants in St. Louis (GX 3F, p. 5). Moreover, the Little report recommended various alternative processes for constructing a less expensive plant; the company apparently either failed to test these or found them satisfactory.

Falstaff argues that because of the size of these smaller brewers, a toehold acquisition was not economically attractive (Motion to Affirm, p. 11). The point is not well taken, however. To be sure, none of the three plants mentioned above had a million-barrel capacity, which may be necessary in New England for efficient operation (App. 375; compare App. 557; DX 10, p. 99). But Falstaff could have altered that situation through expansion of whichever brewer it acquired.

Indeed, Falstaff had substantial experience with the enlargement and modernization of small and ailing breweries. ~~Indeed,~~ Its president testified that Narragansett was the first brewery acquired by Falstaff which at the time of acquisition was not "dying or dead" (App. 324). Falstaff's New Orleans plant, for example, with a current annual capacity of 1.1 million barrels, had a capacity of only 140,000 when Falstaff acquired it (App. 420–421; GX 2, p. 4); and its Omaha plant produced at the time of acquisition only 150,000 barrels per year, but now has a capacity of 750,000 barrels (App. 420; GX 2, pp. 2–3).[*]

In view of this objective evidence—*i.e.*, the presence of several small brewers in the New England market amenable to acquisition by a potential entrant, Falstaff's financial capability to acquire and expand them, and its past experience in improving the capac-

[*] Similarly, Falstaff expanded the capacity of its Fort Wayne, Indiana, plant from 400,000 to 1,000,000 barrels per year; the capacity of its Galveston, Texas, plant was increased from 400,000 barrels to 1.2 million barrels annually (App. 420–421; GX 2, pp. 4–5).

ity of failing beer plants—a "toehold entry" into New England was a rational business alternative.

Furthermore, the record indicates that, had Falstaff entered this market by constructing a new brewery or by acquiring a small plant and expanding it, the company, despite its assertions to the contrary (Motion to Affirm, pp. 7–8, 10–11), could have developed an effective distribution system in the area.[37] There are, as we have noted, two methods by which a brewer can distribute its beer: company-owned branches and independent wholesale distributors. Falstaff had used both in other areas of the country (App. 455; GX 5, p. 5), and neither method was foreclosed to it in New England.

In its 1960 report, Arthur D. Little noted that Falstaff's branches, although then responsible for distribution of only 25 percent of the company's beer, accounted for half of the company's after-tax profits (App. 552; GX 10, p. 66).[38] The report demonstrated that branch distributions netted Falstaff a profit of approximately $2.00 per barrel over what could be made on sales by independent distributors (App. 551; GX 10, p. 65). The company thus had a strong financial incentive to distribute in New England through branches. As we have shown (*supra*, pp. 27–30), it had the economic resources to establish and maintain a branch distribution system there, and, from its own

[37] On this point, as on virtually all the others discussed in this brief, the district court failed to make any detailed findings as required by Rule 52(a), F.R.Civ.P. Cf. *United States* v. *El Paso Natural Gas Co.*, *supra*.

[38] This part of the Little report was based on Falstaff's sales and earnings for 1958.

operations in other markets, it had the experience and knowledge to run such a system effectively.

Alternatively, Falstaff could have established an effective distribution system through wholesale distributors. In 1964, roughly eighty percent of its sales were made in this manner (App. 455; GX 5, p. 13). As the company had acquired weak or failing breweries and expanded them over the years, it had built up an effective corps of 600 distributors (App. 455; App. 440; GX 5, p. 13; GX 3F, p. 11).

To achieve an effective wholesale distribution system in New England, Falstaff's president stated that a new entrant would need to offer potential distributors three things: a company marketing plan under which the brewer spent adequate sums of money to promote the product to the buying public (*i.e.*, advertising); a wholesale price permitting a profitable mark-up; and a product with a good reputation (App. 41). Falstaff could provide all three elements.

The reputation of its beer was first rate (GX 10, p. 1). It had for years provided a profit mark-up to its distributors adequate to build what it considered an excellent distributor network (App. 440). The company was innovative and aggressive in its marketing."[*] Moreover, as Falstaff's president testified (App. 359), a distributor expects the brewer to spend substantial

[*] The company was a leader in the development of certain practices conducive to the establishment and maintenance of sound distributorship: it promulgated the company-distributor "Code of Cooperation," and it created a Distributor Advisory Council (App. 440; GX 3F, p. 10; and see App. 359).

sums on advertising, and Falstaff stressed continuously that its advertising, conducted in print and electronic media,[40] was extensive and effective (App. 437–441; GX 3B, p. 8; GX 36, pp. 5–6; GX 3D, pp. 6–7; GX 3E, pp. 1, 12–13; GX 3F, pp. 11–12).[41]

Finally, the evidence shows that there were beer distributors in New England interested in marketing Falstaff's product. Between 1960 and 1965, the company had received thirty unsolicited inquiries from firms and individuals in the area offering to handle Falstaff beer should the company enter the market (App. 470–535; GX 9). Nineteen of the thirty were already established independent distributors (Motion to Affirm p. 10 n. 9).[42] Moreover, there were a great many more

[40] Television advertising time was available in New England (App. 382–383).

[41] Where the company was unwilling to spend a sufficient amount on advertising, it was unable to establish or maintain adequate distribution or sales. Thus, Falstaff's entry into the Detroit area was unsuccessful. It did not advertise sufficiently to hold its first distributors. When these distributors failed, the company lost sales and cut back further on advertising, which made it impossible to attract or hold new distributors and make sales (App. 296–297, 355–358). By contrast, in Chicago, where Falstaff made heavy advertising expenditures, the company buoyed its distributors and had good sales and profits (App. 593–594; DX J; and see App. 356).

[42] Thus, Falstaff's claim that there was "no evidence of the capacity of any of these [thirty] individuals or firms to provide effective distribution" (Motion to Affirm, p. 10) is unfounded. Several of the letters explicitly show that the distributor had both the ability and capacity to be effective (see *e.g.*, App. 483–520; GX 9, no. 1 1017, no. 1 1042). Moreover, the thirty inquiries referred to came to Falstaff unsolicited; they were merely representative of a much larger group of distributors who were potentially available should the company attempt to recruit them.

beer distributors potentially available to Falstaff upon entry. In New England, distributors do not have exclusive distributorship contracts (App. 383); they could, and frequently did, handle more than one brand (App. 507, 483; GX 9, no. 1 1061, no. 1 1017); and both brewers and distributors could switch their affiliations (App. 383).

In sum, the detailed objective evidence in this case—which the district court disregarded in favor of management's stated subjective preferences and intentions—shows, we submit, that Falstaff was a significant potential entrant into the New England beer market. Nor were there any significant obstacles to its entry *de novo* or by a small "toehold" acquisition; it had the capability, the interest and the incentive to come into the market by either course and compete vigorously to obtain a significant market share. By acquiring Narragansett with its 20 percent share of the New England market, Falstaff eliminated the substantial competitive effects of its role as a potential competitor. It removed perhaps the last real possibility for deconcentration of the highly concentrated New England beer market, the effect of which "may be substantially to lessen competition" in the area, contrary to the fundamental purpose of Section 7 of the Clayton Act. See *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 362–363; *United States* v. *Penn-Olin Chemical Co., supra,* 378 U.S. at 170–171; *Brown Shoe Co.* v. *United States, supra,* 370 U.S. at 331–332.

## CONCLUSION

The judgment of the district court should be reversed and the case remanded for the entry of an appropriate decree.

Respectfully submitted.

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**Errata.**

Page 2, line 17 should end with a period.

Page 13, the reference in the last line of footnote 9 should read 68 Colum. L. Rev. 1231, 1244 (1968).

Page 17, the reference in line 4 should begin GX.

Page 17, the first character in the last line of the regular text should be G.

Page 18, the last part of the reference in the third line of the third paragraph should be Apx. B.

# Supreme Court of the United States.

OCTOBER TERM, 1971.

No. 71-873.

UNITED STATES OF AMERICA,
*Appellant,*
*v.*
FALSTAFF BREWING CORPORATION,
*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND.

## BRIEF FOR FALSTAFF BREWING CORPORATION.

### Preliminary Statement.

The statements in the government's brief concerning the travel of the case, jurisdiction, and the statute involved are correct. The government's statement of the question presented is not.

The government insists that the question presented is whether the district court applied an erroneous legal standard in holding that Falstaff's acquisition of Narragansett did not violate Section 7 of the Clayton Act by eliminating the potential competition of the acquiring firm. As appears from the government's brief, the "erroneous legal stand-

ard" is the district court's reliance on statements of Falstaff's management to the exclusion of the other evidence presented. This contention is clearly at variance with the record and the opinion of the court below.

## The Question Presented.

The question presented, properly stated, is:

Are the findings of the court below clearly erroneous?

## Statement.

### The Proceedings Below.

On July 15, 1965, Falstaff acquired the assets and assumed the liabilities of Narragansett. This suit was brought two days earlier, seeking an injunctive order against the acquisition and ultimate relief to enjoin or to undo it. Preliminary relief was denied. On motion of Narragansett the suit was dismissed as to it and judgment was entered accordingly. There was no appeal (App. 1-2).[1]

Trial began October 6, 1970, and concluded October 14, The government offered no live testimony; it relied upon documentary evidence, excerpts of depositions of the principal officers of Falstaff, answers to interrogatories, and stipulations.

The government's brief makes clear its position on this appeal: that the findings of the court below are not supported by the evidence. The government asks this Court to weigh the evidence anew and to reverse.

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[1] "App." references are to the printed appendix in this Court; "GX" references are to government-appellant's exhibits introduced in the district court; "DX" references are to defendant-appellee's exhibits introduced in the district court; "Apx." references are to the appendices to this brief.

The government is wrong: the district court correctly found the government failed to sustain its burden of proof on critical issues; *i.e.*, (1) that Falstaff was a potential entrant into the New England market other than by acquisition of a brewer with a strong distributor organization, and (2) that the acquisition would probably substantially lessen competition.

The evidence offered by the government falls far short of establishing either of these contentions, and the post-acquisition evidence, properly admitted and considered by the district court, establishes that the acquisition did not, in fact, have the anti-competitive effect proscribed by Section 7.

Since the sole question is whether the evidence supports the findings of the district court, it is appropriate that those findings should be adverted to here. The court found, upon review of the evidence:

> "In my considered opinion the plaintiff has failed to establish by a fair preponderance of the evidence that Falstaff was a potential competitor in said New England market at the time it acquired Narragansett. The credible evidence establishes that it was not a potential entrant into said market by any means or way other than by said acquisition. Consequently it cannot be said that its acquisition of Narragansett eliminated it as a potential competitor therein.
>
> "I also find that the Government has failed to establish by a fair preponderance of the evidence that said acquisition by Falstaff will probably result in a substantial lessening of competition in the New England beer market. Section 7 of said Clayton Act is concerned with probabilities, not mere possibilities. Brown Shoe Co., Inc. v. United States, 370 U.S. 294 (1962). It

is my considered opinion that said acquisition by Falstaff will serve to improve the competitive position of the Narragansett brand of beer in the New England beer market which is intensively competitive, and enable it to compete successfully with the brands of large, national breweries which dominate said market.

"Finding, as I do, that it is not probable that said acquisition of Narragansett by the defendant Falstaff may substantially lessen competition in said New England beer market, judgment must be and will be entered in favor of the defendant Falstaff Brewing Corporation." *United States* v. *Falstaff Brewing Corporation*, 332 F. Supp. 970, 972-973.

## The New England Beer Market.

The parties agreed upon the relevant market. Geographically, it consists of the New England States (GX 1, App. 18-19, 390).[2] In that market at the time of the acquisition, these facts were true:

The increase in sales of beer during the four years preceding the acquisition was less than the increase in national sales in that period (computed from GX 1, EX N, App. 18-19, 407). The price of beer remained relatively stable in spite of rising costs (App. 374). There was a high degree of instability of market shares of the sellers, and substantial technological innovations (App. 230-231, GX 1, App. 18-19, EX O-Z, App. 408-413). This is significant evidence of intense competition within the market (App. 230) and

[2] The New England States were stipulated to be Maine, New Hampshire, Vermont, Massachusetts, Connecticut and Rhode Island (GX 1, App. 18-19, 390). Care must be taken not to equate the term "New England" with the terms "Northeastern" or "Eastern Coastal." The latter include the New England States as well as Ohio, Pennsylvania, New York, New Jersey and perhaps Maryland and Delaware (GX 10, App. 52, 549).

supports the characterization of competition in the market as "dog-eat-dog" (App. 310-311).

### Falstaff, the Acquiring Company.

At the end of 1964, Falstaff sold primarily in the midwest, south and southwestern regions of the United States (*ibid*). It sold its product no closer to the New England market than Toledo, Ohio, on the west and Richmond, Virginia, on the south (App. 302, GX 2, App. 20, 422-425). Its last acquisition, prior to 1965, was in 1956 when it purchased the Mitchell Brewery of El Paso, Texas—capacity of 120,000 barrels per year (GX 2, App. 20, 421).

For some years, Falstaff had expressed publicly its desire to become a national brewer[3] (App. 79-83, GX 13, App. 20, GX 14, App. 80, GX 15, App. 80, GX 16, App. 81, GX 17, App. 81),[4] and while its directors recognized the desirability of entering the *northeast* market, no specific target was established, nor was any program adopted to that end (App. 101-102). Falstaff did not undertake exhaustive investigations looking toward entry into that market (GX 6, App. 25, 459-461).

Between 1960 and 1964, Dawson's (App. 73),[5] Liebmann (App. 134, 300) and Ballantine (App. 142), as well as Narragansett (App. 302-303) initiated negotiations with Falstaff with a view to being acquired by it. Falstaff rejected out of hand Dawson's approach for the reason, among others, that Dawson's lacked an effective distributor organi-

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[3] The national brewers are Anheuser-Busch, Schlitz, Pabst and Miller (App. 39).

[4] We assume that these expressions of intent do not impress the government since they constitute "subjective" evidence.

[5] A number of other small brewers contacted Falstaff. Falstaff was not interested in them because of their lack of effective distributor organizations (App. 325-327).

sation (App. 325). Every potential acquisition was measured by one overriding criterion—the availability of an effective distributor organization (App. 125, 130, 193). Falstaff made no plans to force entry into the market. It was content, if negotiations failed with one or another company, to await developments, since its management believed that entry other than by acquisition was not feasible (App. 189, 190, 193-194, 297).

Falstaff's primary method of distributing beer was, and is, through independent wholesalers (GX 5, App. 23, 454). In 1965, over 80 per cent of its product was distributed by such wholesalers (*ibid*). In the cities of San Diego, Orange, Fresno, and San Francisco, California, it sold through company branches; in cities where it maintained breweries, it maintained branch operations to supply the local market (*ibid*). Its experience had demonstrated that the key to market penetration was the existence of a viable distributor organization (App. 296-298, DX I, DX J, App. 322, 591-594).

### Narragansett, the Acquired Company.

At the time of the acquisition, Narragansett was a regional brewer which sold, with the exception of certain minimal sales, only in New England (App. 376). Eighty-five per cent of its common stock was controlled by two families (App. 378). As early as 1956, its management came to the conclusion that without significant growth Narragansett could not survive (App. 372-373). Since so much of the wealth of these families was concentrated in the capital stock of Narragansett, management decided either to expand Narragansett or have Narragansett bought out (*ibid.*). Faced with strong and vigorous competition, it sought without success to acquire other brewers (App. 374-379). Failing in these attempts, it concluded negotiations with Falstaff.

## Summary of Argument.

The findings of the trial court will not be set aside unless clearly erroneous. This Court will not substitute its judgment for that of the trial court unless upon review of the entire record it is left with a firm and clear conviction that a mistake has been made.

Classifying evidence as subjective or objective has no significance here. The determination of admissibility turns on the materiality and relevance of the proffered evidence. The weight to be given it is left to the sound discretion of the trier of fact. This is particularly true of evidence of design or intent. Expressions of intent are particularly entitled to credence where, as here, they are supported by consistent prior conduct.

Upon the record below, it is abundantly clear that the government failed to prove that Falstaff was a potential entrant into the New England market by any of the means suggested by the government. While the New England beer market may be characterized at the time of the acquisition as "concentrated," nevertheless the *objective* evidence establishes that competition in that market was intense. But even assuming deviation from a competitive norm, the government offered no evidence that entry *de novo* offered a reasonable expectation of profit to Falstaff. Without such evidence, and in the context of the substantial evidence proving that entry without a distributor organization would have been foolhardy, the government's case fails. Similarly, the claim that Falstaff could have entered the market by a "toe-hold" acquisition is not supported by the record.

Ultimately it was the government's burden to establish that the acquisition would probably lead to a substantial lessening of competition in the New England beer market. It did not establish that the market was of the type which could be benefited by Falstaff's presence at the edge, for the

evidence establishes that Falstaff had no effect on the level or manner of competition. Moreover, the evidence supports the district court's findings that the acquisition did not have an anti-competitive effect. Since the acquisition, Narragansett's share of the market has fallen, its operations have become unprofitable, prices have remained constant in relation to increasing costs and the market shares of the leaders have substantially changed. All of these facts are evidence of intense competition in the market. There being no evidence of any reasonable expectation of a diminution in the level of competition, it must follow that the government failed in its burden on this issue.

## Argument.

THE DISTRICT COURT PROPERLY CONCLUDED THAT THE GOVERNMENT FAILED TO PROVE FALSTAFF WAS A POTENTIAL COMPETITOR IN THE NEW ENGLAND BEER MARKET OR THAT THE ACQUISITION OF NARRAGANSETT WOULD *Probably* RESULT IN A SUBSTANTIAL LESSENING OF COMPETITION.

### A. *The Trial Court's Findings of Fact may Not be Disturbed unless Clearly Erroneous.*

The government adheres to the position taken in its jurisdictional statement that the district court applied an erroneous legal standard in arriving at its findings. *Compare* Jurisdictional Statement, pp. 9, 11-13, *with* Appellant's Brief, p. 2. We have again sought to determine what standard was erroneously applied and have again concluded that the government's quarrel is with the weight given to certain evidence, which evidence it characterizes as "subjective" (Appellant's Brief, pp. 20-22). It persists in ignoring the plain language of the district court's opinion (see *supra*, pp. 3-4), and the testimony and the voluminous statistical evidence.

The government asserts that Falstaff was a potential competitor by marshaling only a portion of the evidence contained in the record. As to all other evidence, it asks this Court to discount it except where favorable to its case.[6]

This is no more than asking this Court to try the matter *de novo*, which this Court has consistently refused to do. *E.g., United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341-342 (1949); *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 339-340 (1952). The district court's findings will not be set aside unless clearly erroneous. *United States* v. *Yellow Cab Co., supra*, 338 U.S. at 341-342. Its findings are not clearly erroneous unless this Court, upon all the evidence, is "left with the definite and firm conviction that a mistake has been made." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Where the evidence supports a conclusion either way, the fact that the trial judge adopts one as opposed to another conclusion impeaches neither his "impartiality nor the propriety of his conclusions." *Chaney* v. *City of Galveston*, 368 F. 2d 774, 776 (5th Cir. 1966); and see *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 337 U.S. 656, 659-660 (1949).

In *Yellow Cab*, the government attack on the opinion below was that the district judge "'. . . ignored . . . substantially all of the facts which the Government deemed significant.'" And that his opinion "'. . . seems to reflect uncritical acceptance of defendants' evidence and of defendants' views . . . .'" of the law. *United States* v. *Yellow Cab Co., supra*, 338 U.S. at 340. There, this Court found that there was not the slightest justification for these charges.

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[6] The government is perfectly content to rely on "subjective" evidence and post-acquisition evidence when it is favorable to its case. See, for example, Appellant's Brief, p. 8; App. 195.

Here, the government charges that the district judge relied "exclusively upon statements by [Falstaff's] . . . management disavowing any intent to have Falstaff enter the market other than by the acquisition of Narragansett . . . ." (Appellant's Brief, p. 14).

As in *Yellow Cab*, there is not the slightest justification here for a charge as critical and extravagant as this. Rather, examination of the record brings to mind the comment of the late Justice Harlan in his brief but pungent dissent in *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 183 (1964):

> "I can see no purpose to be served by this remand except to give the Government an opportunity to retrieve an antitrust case which it has lost, and properly so. Believing that this Court should not lend itself to such a course, I would affirm the judgment of the District Court."

B. *In Arriving at its Findings, the Trial Court was Required to Receive and Weigh All Material Evidence.*

It is impossible to pass to the merits of this appeal without commenting on the propriety of the district court's consideration of certain evidence. Without explicitly saying so, the government in effect argues for exclusion of what it terms "subjective evidence" in Section 7 cases (Appellant's Brief, pp. 21-26). It argues that objective evidence is the only reliable evidence.[7]

Section 7 by its very terms requires inquiry into probabilities. *Brown Shoe Co., Inc.* v. *United States*, 370 U.S. 294, 323 (1962). By and large, the existence or nonexistence of

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[7] Limiting the district court to consideration of objective evidence goes hand and glove with the government's so-called objective test. The government asserts that an objective test is necessary to insure predictability. While predictability in the law is de-

a violation of Section 7 is not "susceptible of a ready and precise answer." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 362 (1963). To ascertain whether Section 7 has been violated, the trial judge should receive and consider all relevant evidence which bears on the issue.

To support its claim that subjective evidence should be excluded, the government distorts the meaning of an excerpted portion of this Court's opinion in *United States* v. *Penn-Olin Chemical Co., supra*, 378 U.S. at 175 (Appellant's Brief, p. 21). Neither in that excerpt nor elsewhere in the opinion does this Court say that it is impermissible for the district court to receive and weigh such evidence. All the Court held in that portion of the opinion was that the record provided *prima facie* evidence that both joint venturers might have entered the market and that the government was not required to prove that management actually intended to enter said market in order to make out a *prima facie* case. In so doing, the Court noted that each participant

> "had the know-how and the capacity to enter that market and could have done so individually at a reasonable profit. Moreover, each company had compelling reasons for entering the southeast market." 378 U.S. at 175.

The government argued that probability of independent entry should be presumed from a showing of capability and interest. *See* pp. 30, 31, 35, 38 and 39 in government's brief in *Penn-Olin*. That suggestion was rejected. Both of the joint venturers were concededly potential competitors, each with capability and interest, and the government argued that it was sufficient to show that either "could" have

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sirable, it cannot be used to subvert the plain language of the statute. Moreover, this objective test does not provide any increased ability to predict the outcome in Section 7 cases. See *infra*, n. 21.

entered. *United States* v. *Penn-Olin Chemical Co., supra,* 378 U.S. 172-173. In remanding that case for findings on the issue of probability, this Court necessarily rejected that argument.

Statements of design and intent are entitled to credence where consistent with prior conduct. See *Nasser* v. *United States,* 257 F. Supp. 443, 447-448 (N.D. Cal. 1966); cf. *Flynn* v. *Crume,* 101 F. 2d 661, 664 (7th Cir. 1939). The record demonstrates that Falstaff's conduct prior to the merger was consistent in all respects with management's view that entry into the New England market, either *de novo* or by "toe-hold" acquisition, would not be a rational economic undertaking. Accordingly, the district court properly relied on management's statements of intent.[8]

### C. *The Evidence Conclusively Establishes that Falstaff was Not a Potential Competitor in the New England Beer Market Other than by the Acquisition of Narragansett.*

It was the government's burden to prove that the *probable* result of the acquisition would be to substantially lessen competition in New England in the production and sale of beer. It chose to meet that burden in part by claiming that the acquisition eliminated potential future competition between Falstaff and the other sellers in the market. To accomplish this end, it was incumbent upon the government to demonstrate that Falstaff would probably have entered the market by the means it suggests, for Section 7 is con-

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[8] The government also faults the district court for relying "principally" on post-acquisition evidence (Appellant's Brief, n. 30, at p. 32) which must have been difficult if the court relied solely on "subjective" evidence. The court did receive such evidence and properly so. *United States* v. *Pabst Brewing Co.,* 384 U.S. 546, at 550-551 (1966); see also *Federal Trade Commission* v. *Consolidated Foods Corp.,* 380 U.S. 592 (1965).

cerned with probabilities and not with "ephemeral possibilities." See *Brown Shoe Co., Inc.* v. *United States, supra,* 370 U.S. at 323.

The government recognizes that the determination of the possibility of potential entry by Falstaff involves three factors: (1) the growth and structure of market; (2) expectation of a reasonable profit;[9] and (3) financial capability and incentive to enter (Appellant's Brief, p. 26). As to all of these factors, the burden was on the government to prove their existence. Falstaff concedes that given an acceptable level of profit it had the financial capability and the interest to enter the New England beer market.[10] But the existence of an acceptable level of profit can only be determined by ascertaining the potential profit which Falstaff might have

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[9] The government speaks in terms of "reasonable prospects for making . . . entry successful." We conclude in light of the citation that the term is equivalent to an expectation of a reasonable profit. See Appellant's Brief, p. 25, and n. 25, at p. 25. The probability of entry can only be judged in terms of Falstaff's rational economic interests. Davidow, "Conglomerate Concentration and Section Seven: The Limitations of the Anti-Merger Act," 68 Column. L. Rev. 1231, 1244 (1968).

[10] Without assurance of an acceptable level of sales, there could be no expectation of an acceptable level of profit. And without that expectation, it is unlikely that Falstaff could have borrowed the money to build a brewery. As its president testified:

> "In the first place, we had no sales in New England, and for us to have attempted to finance the brewery of the size of which we believe necessary above a million barrels, there was no way that we could estimate to any degree of certainty what kind of sales we would generate after we built the brewery, and therefore, it would have been a difficult thing for us in my opinion to borrow the money. Certainly we never could have justified it to our stockholders, because we did find it very difficult to open in major metropolitan markets where entrenched rulers were already doing business without a decent distributor system. That is, the reason why we did acquire, it was the distributorship purely and simply." (App. 296.)

earned by entering through the means the government suggests as compared with other markets within which Falstaff was operating, or which it might have entered. The government failed to produce this evidence.

The government proved only that Falstaff had the desire to be a national brewer and that such a desire entailed expansion into the Northeastern market. From these facts, however, it does not follow that, for purposes of Section 7 of the Clayton Act, Falstaff was a potential entrant into the New England market.

The government made no attempt to prove at what time Falstaff's aspiration to national status would result in penetration of the New England market. Showing that this acquisition violated Section 7 by eliminating potential competition, requires at least proof that the potential would have been realized within the period during which the characteristics of the market remained essentially the same as they were at the time of the acquisition. It is only with respect to this period of time, the *foreseeable future*, that a reasonably accurate prediction can be made as to whether a merger may result in a substantial lessening of competition. Merely showing that a firm not selling in one part of the country desires eventual sales in a national market is not sufficient.

The government points to the New England beer market and concludes that entry was attractive for the sole reason that sales of all brands increased by almost 10 percent in a four-year period (Appellant's Brief, p. 27). The government points to Narragansett and asserts that Narragansett's experience was typical. One may ask, "Typical of what?" There is no evidence in the record that Narragansett's sales or profit experience was necessarily typical of that of its competitors. Nor was there evidence suggesting that the New England market was growing more rapidly or was

more attractive than other markets.[11] In fact, the testimony of Carl Haffenreffer that Narragansett had been in a price squeeze for several years strongly points the other way. He said:

> "Well, it was competitive. There were those who were cutting prices, but the major force was the fact that they were not—that the larger breweries were not raising their prices as costs increased, labor and material costs increased, with the result there was a price squeeze on our brewery." (App. 374.)

Beyond this, there was substantial unrebutted evidence that competition in the market was intense (App. 310, 374, 230). At the time of the acquisition, the substantial growth in the market shares of the national brewers was just beginning to occur. *Compare* GX 1, EX O-Z, App. 18-19, 408-413 *with* DX H, App. 208, 590, Apx. A. This evidence of the actual conditions in the market is more persuasive than evidence of concentration which in and of itself merely gives rise to a suspicion that competition may no longer be the dominant force.[12]

Assuming that evidence of concentration was sufficient to establish a noncompetitive market structure, it remained for

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[11] It is unnecessary to comment at any length on the assertion by the government that the New England beer market had the capacity and size to sustain new entrants. There is no evidence to support such a conclusion and the district court did not so find.

[12] There is no necessary correlation between the level of competition and market concentration (App. 226-227).

> "Q. What I want you to tell me now, Mr. Horowitz, is the relationship of concentration, whoever uses the term, to competition.
>
> . . . . . .
>
> "A. As far as we know there is none. (App. 226.)

the government to prove that entry by the means it suggests would have offered Falstaff an acceptable level of profit. *United States* v. *Penn-Olin Chemical Co., supra,* 378 U.S. at 175; see also Pitofsky, "Joint Ventures under Antitrust Laws: Some Reflections on the Significance of Penn-Olin," 82 H.L.R. 1007, 1028 (1969). The government did not carry this burden.

Its sole evidence on *de novo* entry is the A. D. Little study which recommended construction of a brewery near Baltimore, Maryland (GX 10, App. 81, 543). The government offered no evidence to establish the trustworthiness of any of the conclusions of this report or the assumptions on which those conclusions were founded. The government was content to introduce the report in evidence, select certain portions favorable to its position and reject those which did not support its contentions. The district court was fully warranted in its refusal to accept the judgments expressed in this study. Falstaff did not accept many of the Little findings (App. 298, 331-332), and the ones which it did accept proved to be wrong (App. 296-297).[12]

Moreover, these recommendations can only be viewed in the context of the assumptions upon which they were based, and there is no evidence, apart from the report itself, that these assumptions were valid. There is, in fact, evidence that they were not. The technology upon which Little based

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[12] The Little study recommended among other things that Falstaff build a brewery in Southern California and that Falstaff enter the Chicago and Detroit markets (App. 545-547). Falstaff went so far as to buy land in Southern California which it later sold when it became apparent that demand for its beer could not justify the construction of a brewery (App. 298). In addition, Falstaff attempted to enter the Detroit and Chicago markets with disastrous consequences (App. 296-297; see also DX I & J, App. 322, 591-594).

its estimate of construction costs could not be implemented[14] (App. 323). And the recommendations for construction of a brewery had as their purpose the penetration of the New York and Philadelphia markets (GK 10, App. 81, 549).[15] The Little report did not recommend construction of a brewery in New England for the purpose of penetrating that market and as a result has no relevance in this proceeding.

Finally, there was no evidence that construction of a brewery would offer Falstaff an acceptable level of profit. The evidence was to the contrary. Falstaff, unlike the government,[16] called as a witness an economist, Dr. Ira Horowitz, who was equipped with impressive credentials and the benefit of extensive studies of the brewing industry. He concluded that it was "unthinkable" that Falstaff would have committed the error of building a brewery in New England in 1964 or 1965 (App. 237-240, 254-255).

The government declines to accept the conclusion of Dr. Horowitz because it disagrees with his assumptions, which, in his words, were "extraordinarily optimistic" (App. 286). It suggests that Falstaff could have earned a higher rate of profit per barrel because such a higher rate was being earned by Anheuser-Busch and Pabst (Appellant's Brief, p. 30). It fails to note that both those companies were at the time experiencing their greatest increase in sales (DX 6, App. 208, 489).

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[14] The government claims that these technological assumptions were implemented and points to GX 17, pp. 7-8. Falstaff's director of research states that outdoor fermentation tanks were under construction, not in use. Apparently these tanks were not satisfactory (App. 323).

[15] This illustrates why Falstaff cautions that the terms "East Coast" and "New England" are not co-extensive. See n. 2, *supra*.

[16] On two occasions, the government requested and was granted permission to have its staff economists sit with counsel (App. 196, 315). These economists did not testify.

The government is unable to effectively dispute the most significant assumption made by this witness, *i.e.*, that Falstaff would have to sell 850,000 barrels of beer during the first ten years and 1,000,000 barrels per year thereafter in order to achieve a 6.7 per cent rate of return (App. 238). The government correctly asserts that Dr. Horowitz's calculations do not take into account the fact that a portion of this productive capacity could be distributed to other Falstaff markets. Dr. Horowitz was unable to determine with any degree of certainty what that potential was (App. 287). As his statement on that point is the only evidence of record, we think that to impute a value to that factor is so speculative as to be unworthy of credence.

A comparison between the 6.7 percent rate of return projected by Dr. Horowitz and the first year rate of return of 3.7 percent on Falstaff's investment in Narragansett should give no solace to the government (Appellant's Brief, p. 30). The comparison underscores the optimistic nature of Dr. Horowitz's assumption. Is it to be concluded that management would forego a 6.7 percent return in exchange for 3.7 percent if it thought the former were reasonably available?

Post-acquisition evidence settles the matter. In the period 1965 to 1969, Narragansett barrel sales dropped by almost 200,000 (DX H, App. 208, 590, App. B). If, as the government asserts, Narragansett was a dominant force in the market, how likely is it that Falstaff could have achieved a market penetration of 13 per cent (computed on the basis of the figures contained in DX F, App. 199, 581-585) when at the same time Narragansett was losing sales and losing money (App. 299)? If the combined power of Falstaff and Narragansett was insufficient to halt a decline in Narragansett sales, could a new entrant to the market be expected to sell 850,000 barrels of beer?

The likelihood of successful entry cannot be judged by looking merely at productive capacity. It does no good to produce beer if one cannot sell it. On the basis of thirty letters [17] received by Falstaff during the period of 1960 to 1965, the government asserts that a distributor organization was available through which Falstaff could have sold its product (Appellant's Brief, pp. 40-41). There is no showing that any of these distributors had the experience or the capacity to market a new product. Indeed, the evidence is that such an organization was not available.[18]

Nor is there any showing that Falstaff would have undertaken to enter the market by building a brewery without securing a market for the distribution of the product. Management was consistent in its view that a distributor organization was the primary ingredient to entry into the market (App. 189, 190, 193-194). It is inconceivable that a publicly held company such as Falstaff, which had never in its history built a new brewery, would invest $20,000,000 in a new facility without being assured that there was a market for its product. Such an assertion completely disregards the economic realities of the situation, and could hardly be considered credible evidence. *See* n. 10, *supra*.

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[17] Little is known of the "potential" distributors other than what is stated in their letters. Of those letters, fourteen appear to have come from persons or organizations already distributing beer. Of those fourteen, seven were from Massachusetts, three from Connecticut, one from Vermont and three from Maine (GX 9, App. 46, 485-535). As of January 1965, Narragansett had 68 distributors (GX 2, App. 20, 427).

[18] The only substantive evidence on the question of the acquisition of a distributor organization was by Carl Haffenreffer. He said:

> "It would have been very difficult if not impossible. If they tried to create one of existing wholesale distributors I don't believe it would have been possible." (App. 375.)

Falstaff's history of growth is one of expansion to contiguous markets (GX 2, App. 20, 418-422). It fully realized the substantial undertaking that would be necessary to enter a new market without first having the distributor organization. Its earlier attempts to penetrate the Detroit, Chicago and southern California markets resulted in substantial financial reverses for the reason that the distributor organization was never strong enough to withstand the competition[19] (App. 296-299). In light of these experiences, statements of management that it would not enter the New England market by construction of a brewery without first having an effective distributor organization are supported by what must be considered, even in the government's view, "objective evidence" (App. 189, 190, 318).

Failing in its proof on *de novo* entry, the government asserts that Falstaff could have entered the market by "toe-hold" acquisition (Appellant's Brief, pp. 36-38). See *The Bendix Corp.* (FTC), 3 Trade Reg. Rep. ¶ 19,288, vacated and remanded on other grounds, *Bendix Corp.* v. *Federal Trade Commission*, 450 F. 2d 534 (6th Cir. 1971). We do not concede the legitimacy of the "toe-hold" theory in a Section 7 case.[20] Nevertheless, accepting it *arguendo*,

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[19] The government asserts that where Falstaff was willing to spend sufficient amounts on advertising it was able to establish and maintain adequate distribution and sales (Appellant's Brief, n. 41, p. 40). A comparison of the Detroit and Chicago markets proves how erroneous that assertion is. In spite of increasing advertising expenditures in Chicago, Falstaff consistently lost money (DX J, App. 322, 593). Advertising expenditures were reduced in the Detroit market only after the distributors were lost (App. 356).

[20] At best, the "toe-hold" theory is amorphous and as yet has not received the approval of this Court. From the statement of the theory by the government we must assume that a firm outside the market may acquire a strong but small competitor in the relevant market even though that market is concentrated. If this is the case, it seems to be an exception clearly outside the ambit of Section 7 of the Clayton Act.

we think the government was required to establish that entry in the market in that manner would have afforded Falstaff a reasonable profit.

The government's case on the "toe-hold" theory consists of the following: (1) Between 1933 and 1958, Falstaff made a number of acquisitions (App. 66-71, GX 2, App. 20, 418-422); (2) that there were three independent brewers with plants in New England, two with a capacity of 100,000 barrels per year, the other with a capacity of 750,000 barrels per year (GX 1, App. 18-19, 391); and (3) that two of these breweries, Dawson's and Diamond Spring, had made overtures to Falstaff (App. 324-325).

The government couples this with Falstaff's financial capability and prior history of developing small breweries into larger ones (Appellant's Brief, pp. 37-38), and concludes that this was an alternative means for Falstaff to enter the market.

This is altogether insufficient. It is unlikely that there is a market in this country where small firms are not extant, and if the government's theory is correct, the acquisition of other than a small [21] firm will always be a violation of Section 7 without further proof.

If the theory of potential competition has any validity, it is only on the basis that rational alternative means of entry exist. See n. 10, *supra*. The record is barren of any evidence which indicates that any of these brewers could

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[21] The word "small" is of some interest in light of the government's pressure for an objective standard to insure predictability. What constitutes small in the context of the New England beer market? It appears that Dawson's with a capacity of 750,000 barrels was a small brewery in the government's view. Or was it a small brewery because it was a failing brewery? Does small depend on the size of the largest producers in the market? Does small depend on the market share? Since the term "small" is undefined it is difficult to perceive how it lends any further predictability in Section 7 cases.

have been purchased for a price which was reasonable or that they possessed a distributor organization which would have made them attractive to an acquiring company.

The burden is not on Falstaff to prove the negative. The government had available to it subpoena powers whereby it could have brought before the court evidence concerning these three brewers whom it says afforded the opportunity for a "toe-hold" acquisition. Without such evidence, it is gross speculation to assume that any could have been bought for a fair and reasonable price, or that by such acquisition Falstaff could have made a meaningful entry into the market place.[22]

This total lack of evidence must be balanced against Falstaff's consistent rejection of these overtures (App. 325-327). Unless one is to assume that the management of Falstaff operates on a totally irrational basis, one must conclude that it would have investigated these overtures with some diligence if it thought they provided any prospect for meaningful entry into the New England beer market. It is the government's burden to prove that entry in this fashion was probable and not merely possible. *Brown Shoe Co., Inc.* v. *United States, supra,* 370 U.S. at 323. It failed to carry that burden.

D. *The Record is Barren of Evidence Tending to Prove that Competition would Probably be Lessened by the Acquisition of Narragansett by Falstaff.*

The ultimate burden on the government here, as in any Section 7 case, is to establish that the acquisition will *prob-*

[22] In order for Falstaff to be truly a potential competitor in the market, the acquisitions which the government suggests should have afforded it a means for meaningful entry in the market. If as a result of those acquisitions, Falstaff was able to sell only a very minor amount of beer, it would hardly be considered as a

*ably* have a significant adverse impact on competition.[22] Having failed to prove that it was in Falstaff's rational economic interest to enter the market by the means it suggests, it might have made out a case had it been able to demonstrate that Falstaff was "waiting in the wings." *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964). Under this theory, it could argue that the merger deprived the market of Falstaff's presence at the edge of the market. But as the late Justice Harlan said, concurring in *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, at 593-594:

> "... [E]conomic theory teaches that potential competition will have no effect on the market behavior of existing firms unless *present market power is sufficient to drive the market price to the point where entry would become a real possibility.* So long as existing competition is sufficient to keep the market price below that point, potential competition is of marginal significance as a market regulator. Thus in a conglomerate or product-extension case, where the effects on market structure which are easiest to discover are generally effects on the 'condition of entry,' an understanding of the workings of the premerger market cannot be ignored, *and, indeed, is critical* to a determination whether the visible effects on 'condition of entry' have any competitive significance." (Emphasis added.) (Footnote omitted.)

There are several reliable and objective criteria by which the level of intensity of competition in a given market can

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competitor by anybody in the market. The government introduced no evidence to demonstrate that these three brewers afforded a possibility for that kind of meaningful entry.

[22] S. Rep. No. 1775, 84 Cong., 1st Sess. 1950, U.S. Code Cong. and Ad. News, vol. 2, p. 4298; *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, at 562 (concurring opinion of Justice Fortas).

be measured. For example, have there been significant price increases? Has there been market share stability?[24] Both these factors were present in the pre-merger market. *See* pp. 4, 14, *supra*.

Furthermore, the government offered no evidence that Falstaff's presence had any effect on the price of beer.[25] Rather, the evidence of record established that Falstaff had no effect on the level of competition in the New England beer market (App. 257), and, further, that its possible competitors did not consider Falstaff a threat (App. 376).[26]

Even assuming that Falstaff was a potential competitor in some fashion, the record contains no evidence to establish the likelihood and substantiality of an adverse competitive effect resulting from the merger except for evidence of market concentration which in the context of the sub-

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[24] Dr. Horowitz testified as follows:

> "It's very hard to measure if not impossible to measure the degree of competition among the firms. All we can do is attempt to see whether the firms in the industry or in the market are, in fact, the havens [*sic*] as with firms in a competitive market, and what we, behaving as we would expect firms in a competitive industry would behave, that is behaving with respect to the quality of their product, pricing behavior, their willingness to innovate and keep up with technilogical [*sic*] changes, and on that presumably, also, perhaps we can look to the stability, I think perhaps it may be useful to look to the stability of their market shares." (App. 230.)

[25] The government did not introduce evidence as it did in *United States* v. *El Paso Natural Gas Co.*, *supra*, 376 U.S. at 655, to demonstrate that Falstaff's actions had some effect on the price of beer or the level of competition in the New England beer market.

[26] Carl Haffenreffer, former executive vice-president and director of marketing, testified as to Narragansett's view of Falstaff as a competitor prior to the merger. He said:

> "They were no threat. We certainly didn't consider them any threat to us. We had much greater threats to concern ourselves with." (App. 376.)

stantial evidence as to the existence of intense competition has little or no probative value. *See* p. 15, *supra*. The post-acquisition evidence[37] establishes that the merger neither led to increased concentration in the market, or increased market power, *i.e.*, control over prices of the acquired firm.[38] Since the merger, beer prices have remained constant relative to cost (App. 235). Narragansett's share of the market has fallen (DX H, App. 208, 590; Apx. B) and its profits have declined (App. 257-258, 200, DX H, App. 288, 590; Apx. B). Competition in the New England beer market has remained intense and, if anything, has become more pronounced (App. 245-246, 299, 312).

It is significant that the government has chosen to ignore all of the post-acquisition evidence. Neither in its case below nor in its brief in this Court did it mention what took place in the New England beer market between 1965 and

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[37] Dr. Horowitz felt that the post-acquisition evidence was extremely relevant in ascertaining whether the merger had any anti-competitive effects. He testified as follows:

"If I have, as I have here, five years of postacquisition [457] data, I am quite impressed with that . . . .

. . . . . .

"Here I have five years and I think that is an impressive set of observations.

Q. . . . Do you have an opinion as to whether the effect of the acquisition of Narragansett by Falstaff had any effect in lessening competition in this industry in New England?

"A. Yes.

"Q. What is that opinion?

"A. I don't think it had that effect." (App. 263.)

[38] These alternative tests have been suggested as measures against which to judge the effect of "geographic extension mergers" on competition in a market. *United States* v. *First National Bank of Jackson*, 301 F. Supp. 1161, 1189-1190 (S.D. Miss. 1969). The instant merger is a "geographic extension merger" in that it involved two firms producing a similar product in separate geographic markets in which they were not direct rivals. *Id.* at 1190.

the date of trial. This post-acquisition evidence is fatal to the government's case. Accordingly, it claims that consideration of such evidence is improper. However, it had little difficulty in accepting the validity and relevance of such evidence in the *Pabst* case. *See United States* v. *Pabst Brewing Company, supra,* 384 U.S. at 550-551.

Certainly, the court was entitled to consider this objective evidence in arriving at the conclusion that the acquisition did not have an anti-competitive effect. With these facts in hand and the lack of any countervailing evidence, the district court had no alternative but to find that the merger did not result in the lessening (substantial or otherwise) of the highly intense competition that characterizes the New England beer market.

## Conclusion.

The findings of the court below were not clearly erroneous. They are fully justified by the record, and the judgment below should be affirmed.

Dated July 10, 1972.

Respectfully submitted,

MATTHEW W. GORING,

JAMES S. McCLELLAN.

Of counsel:

JEROME M. McLAUGHLIN,

STEPHEN J. CARLOTTI.

# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 71-873

UNITED STATES OF AMERICA, APPELLANT

*v.*

FALSTAFF BREWING CORPORATION AND NARRAGANSETT BREWING COMPANY

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND*

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## REPLY BRIEF FOR THE UNITED STATES

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Falstaff misconceives the standard of proof required to establish that an acquisition's effect "may be substantially to lessen competition" within the meaning of Section 7 of the Clayton Act. Under its analysis the government apparently would have to show that Falstaff's management had affirmatively decided to enter the New England market, and then had changed its plans because it determined to acquire Narragansett; that small breweries which might

form the basis for foothold entry were currently for sale on terms acceptable to Falstaff; and that as a result of its decision to enter by acquisition of a large market share, concentration in New England actually increased. Such requirements would make Section 7 virtually inapplicable to cases involving the elimination of potential competition.

The purpose of Section 7 was to stem a rising tide of concentration in American industry. Congress's concern with structural factors was based upon its belief that industry structure is the index of measurable competition. Apart from the use of criteria such as relative market shares, and concentration, it is, as Falstaff's expert testified, "very hard to measure if not impossible to measure the degree of competition among the firms" (App. 230). That is why this Court has in numerous decisions under Section 7 concluded that market structure—the total number of firms, their relative market shares, the extent of concentration among the leading firms, barriers to entry, and the influence of outside firms as potential competitors—is the standard by which a tendency toward the lessening of competition will be measured (U.S. Br., p. 16).

In applying Section 7 to this case, therefore, the government was required to demonstrate only that Falstaff's place in the structure of the New England market was that of a significant potential competitor; and that its self-elimination from that role by acquiring Narragansett's 20 percent market share, instead of entering as a new or foothold competitor,

would probably lessen competition substantially. As explained in our main brief, the government made that showing.

a. *Falstaff as a potential competitor in New England.* To establish that Falstaff was a significant potential competitor in the New England market, the government showed, from objective evidence, that considering the concentrated structure of the New England market, Falstaff's financial capability to enter independently or by a foothold acquisition, its economic incentive to do so, and the reasonable prospects for making such an entry successful, there existed a basis for entry which would be reasonably acceptable to prudent management, if entry by acquisition were not available. (U.S. Br. p. 25.)

Whether in fact Falstaff's management would have entered is not the point. For the question is not what management would have done, but what it reasonably could have been expected to do. It is the latter factor that makes potential competition a significant influence upon market structure.

Under this practical criterion, the government met its burden. It showed the New England market was expanding, that Falstaff's business advisor (Little) had urged it to enter the Northeast *de novo* (and had warned of the antitrust risks of entering by a large acquisition, App. 557); that numerous small distributors were anxious to handle its product; that, according to its own expert, Falstaff could have earned a better rate of return on a new plant than it in fact has earned from the acquisition (App. 287-289);

that it had substantial experience in expanding small, faltering breweries into profitable operations; that it had a superior financial rating which would enable it to obtain financing; and that it had been a leader in developing its own distributor organization. All of these factors demonstrate that its independent or foothold entry could be considered a prudent business risk and that it thus was an influence on the market. Indeed, the small distributors who had written to it, and the two small breweries which invited it to acquire them, are strong evidence that even at their level Falstaff's role as a potential competitor was recognized.

Falstaff argues that the government, to show reasonable prospects for successful entry, must ascertain "the potential profit which Falstaff might have earned" by entering New England *de novo* or by a foothold entry (Br. 13-14). But its influence as a potential entrant could affect the pricing behavior of firms in the market, so that prices became stabilized below the level of profitability which would encourage it to enter. *United States* v. *Penn-Olin Co.*, 378 U.S. 158, 174. Insofar as the profit Falstaff might have earned by actual entry is concerned, proof of what might have been is always conjectural. All that can, or need, be proved is that a reasonable basis for successful entry exists. And this basis necessarily takes into account the fact that all marketing decisions involve some risk.

Falstaff's erroneous insistence upon precise proof of what might have been also permeates its conten-

tion that it could not have made a foothold acquisition in New England. It calls for proof of the terms on which such acquisitions might have been made (Br. 21-22). But again, Section 7, which concerns only probabilities, does not go so far. As we have shown (U.S. Br., p. 36), both Dawson's Brewery in New Bedford, Massachusetts, and Diamond Spring in Lawrence, Massachusetts, had made overtures to Falstaff (App. 324-325), and Falstaff had approached New York and New Jersey brewers (Piel's, Ballentine's,[1] Liebman's) with substantial New England sales (U.S. Br. 31). Even without such overtures, however, the smaller firms represented the same kind of candidates for lawful acquisition as the many other small breweries Falstaff had acquired and developed as it grew to its present size and strength. See *Kennecott Copper Corp.*, 3 Trade Reg. Rep. ¶ 19,619 (FTC), affirmed, C.A. 10 No. 71-1371 (September 15, 1972).

We do not question that Falstaff might not have found the acquisition of one of the smaller companies in the market to be as "attractive" (Br. 21-22) as the acquisition of Narragansett's strong market position and distributor organization. Anticompetitive acquisitions are attractive precisely because they are highly profitable. But it is the purpose of Section 7 to channel profit-making decisions into pro-competitive directions. Hence the comparative attractiveness of easy entry by acquisition against more difficult

[1] Falstaff has now acquired certain Ballentine assets (U.S. Br. p. 10, n. 14).

entry by competition is not relevant where the latter is feasible under the criteria we have outlined.

b. *Competitive Effect.* Falstaff contends that the post acquisition evidence conclusively shows that its acquisition of Narragansett was not anticompetitive because prices in the market have remained constant, concentration has not increased and Narragansett-Falstaff has acquired no power over prices. It also argues that there has been no adverse competitive effect because, despite the acquisition, Narragansett's market share has decreased.

This argument misconceives the competitive issue. The anticompetitive effect of the acquisition is the loss of Falstaff's presence as an aggressive firm standing on the edge of the New England (and the Northeastern) market. What would have been gained, had Falstaff entered *de novo* or by a foothold acquisition, would have been a vigorous new competitor which, in its struggle to enlarge its market share, would have altered the structure of this concentrated market by introducing an additional and vigorous competitive factor. That struggle might even have resulted in lower prices.

Instead, concentration remained at the same levels, prices have not declined, and the structural influence of Falstaff as a potential competitor has been lost. Growth or shrinkage in Narragansett's market share thus sheds no light on whether the merger eliminated potential competition in the New England beer market.

## CONCLUSION

The judgment of the district court should be reversed and the case remanded for the entry of an appropriate decree.

Respectfully submitted.

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THOMAS E. KAUPER,
*Assistant Attorney General.*

OCTOBER 1972.

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## UNITED STATES *v.* FALSTAFF BREWING CORP. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

No. 71-873. Argued October 17, 1972—Decided February 28, 1973

Respondent Falstaff, the Nation's fourth largest beer producer, which was desirous of achieving national status, agreed to acquire the largest seller of beer in the New England market rather than enter *de novo*. The District Court dismissed the Government's resultant suit charging violation of § 7 of the Clayton Act, finding that entry by acquisition, which the court found was the only way that respondent intended to penetrate the New England market, would not result in a substantial lessening of competition. *Held:* The District Court erred in assuming that, because respondent would not have entered the market *de novo*, it could not be considered a potential competitor. The court should have considered whether respondent was a potential competitor in the sense that its position on the edge of the market exerted a beneficial influence on the market's competitive conditions. Pp. 5–11.

332 F. Supp. 970, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, J., joined, and in Part I of which DOUGLAS, J., joined. DOUGLAS, J., filed an opinion concurring in part. MARSHALL, J., filed an opinion concurring in the result. REHNQUIST, J., filed a dissenting opinion, in which STEWART, J., joined. BRENNAN, J., took no part in the decision of the case. POWELL, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

## No. 71-873

United States, Appellant, v. Falstaff Brewing Corporation et al. | On Appeal from the United States District Court for the District of Rhode Island.

[February 28, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

Alleging that Falstaff Brewing Corporation's acquisition of the Narragansett Brewing Company in 1965 violated § 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 18,[1] the United States brought this antitrust suit under the theory that potential competition in the New England beer market may be substantially lessened by the acquisition. The District Court held to the contrary, 332 F. Supp. 970 (1971), and we noted jurisdiction[2] to determine whether the trial court applied an erroneous legal standard in so deciding, 405

[1] Section 7 provides in relevant part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

For the legislative history of the amendment in 1950 that greatly expanded the section's scope, 64 Stat. 1125, see *Brown Shoe Co., Inc. v. United States*, 370 U. S. 294, 311-323 (1962).

[2] Jurisdiction lies under § 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29.

U. S. 862 (1972). We remand to the District Court for a proper assessment of Falstaff as a potential competitor.

As stipulated by the parties, the relevant product market is the production and sale of beer, and the six New England States[3] compose the geographic market. While beer sales in New England increased approximately 9.5% in the four years preceding the acquisition, the eight largest sellers increased their share of these sales from approximately 74% to 81.2%. In 1960, approximately 50% of the sales were made by the four largest sellers; by 1964 their share of the market was 54%; and by 1965, the year of acquisition, their share was 61.3%. The number of brewers operating plants in the geographic market decreased from 32 in 1935, to 11 in 1957, to six in 1964.[4]

Of the Nation's 10 largest brewers in 1964, only Falstaff and two others did not sell beer in New England; Falstaff was the largest of the three and had the closest brewery.[5] In relation to the New England market, Falstaff sold its product in western Ohio, to the west and in Washington, D. C., to the south.

The acquired firm, Narragansett, was the largest seller of beer in New England at the time of its acquisition, with approximately 20% of the market; had been the largest seller for the five preceding years; had constantly expanded its brewery capacity between 1960 and 1965; and had acquired either the assets or the trademarks of

[3] Maine, New Hampshire, Vermont, Massachusetts, Connecticut, and Rhode Island.

[4] Nationally, the number of brewers decreased from 663 in 1935 to 140 in 1965.

[5] Of the three "top ten" brewers that were not selling in New England, Falstaff ranked fourth nationally, the other two ranking eighth and ninth. From Boston, Massachusetts, the distance to Falstaff's closest brewery was 844 miles, while the distance to the eighth and ninth largest sellers' breweries was 1,385 and 2,000 miles respectively.

several smaller brewers in and around the geographic market.

The fourth largest producer of beer in the United States at the time of acquisition, Falstaff was a regional brewer[6] with 5.9% of the Nation's production in 1964, having grown steadily since its beginning as a brewer in 1933 through acquisition and expansion of other breweries. As of January 1965, Falstaff sold beer in 32 States, but did not sell in the Northeast, an area composed of New England and States such as New York and New Jersey; the area being the highest beer consumption region in the United States. Between 1955 and 1966, the company's net sales and net income almost doubled, and in 1964 it was planning a 10-year, $35 million program to expand its existing plants.

Falstaff met increasingly strong competiton in the 1960's from four brewers who sold in all of the significant markets. National brewers possess competitive advantages since they are able to advertise on a nationwide basis, their beers have greater prestige than regional or local beers, and they are less affected by the weather or labor problems in a particular region. Thus Falstaff concluded that it must convert from "regional" to "national" status, if it was to compete effectively with the top four producers.[7] For several years Falstaff publicly expressed its desire for national distribution[8] and after

[6] A "regional," as contrasted with a "national" brewer, is one that is not selling in all the significant national markets.

[7] In 1958, Falstaff commissioned a study of actions it should take to maximize profits. The study recommended, *inter alia*, that Falstaff become a national brewer by entering those areas where it was not then marketing its product, especially the Northeast, and that Falstaff should build a brewery on the east coast rather than buy.

[8] For example, Falstaff in several press releases and in the company publication expressed its desire for national distribution, and at a panel discussion in October 1964 the president of Falstaff, in response to a question as to Falstaff's reaction to industry trends in beer

making several efforts in the early 1960's to enter the Northeast by acquisition, agreed to acquire Narragansett in 1965.

Before the acquisition was accomplished, the United States brought suit [9] alleging that the acquisition would violate § 7 because its effect may be to substantially lessen competition in the production and sale of beer in the New England market. This contention was based on two grounds: because Falstaff was a potential entrant and because the acquisition eliminated competition that would have existed had Falstaff entered the market *de novo* or by acquisition and expansion of a smaller firm, a so-called "toe-hold" acquisition.[10] The acquisition was completed after the Government's motions for injunctive relief were denied, and Falstaff agreed to operate Narragansett as a separate subsidiary until otherwise ordered by the court.

After a trial on the merits the District Court found that the geographic market was highly competitive; that Falstaff was desirous of becoming a national brewer by entering the Northeast; that its management was committed against *de novo* entry; and that competition had not diminished since the acquisition.[11] The District Court then held:

> "The Government's contentions that Falstaff at the time of said acquisition was a potential entrant into said New England market, and that said acqui-

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sales, stated: "For long range planning we are aiming for national distribution. Naturally this involves coming East." App. 82.

[9] Suit was filed against both Falstaff and Narragansett, but as to the latter, the complaint was dismissed shortly after it was filed.

[10] Hereinafter, reference to *de novo* entry includes "toe-hold" acquisition as well.

[11] Over the objections of the Government, the District Court allowed post-acquisition evidence and noted in the opinion that the market share of Narragansett dropped from 21.5% in 1964 to 15.5% in 1969, while the shares of the two leading national brewers increased from 16.5% to 35.8%.

sition deprived the New England market of additional competition are not supported by the evidence. On the contrary, the credible evidence establishes beyond a reasonable doubt that the executive management of Falstaff had consistently decided not to attempt to enter said market unless it could acquire a brewery with a strong and viable distribution system such as that possessed by Narragansett. Said executives had carefully considered such possible alternatives as (1) acquisition of a small brewery on the east coast, (2) the shipping of beer from its existing breweries, the nearest of which was located in Ft. Wayne, Indiana, (3) the building of a new brewery on the east coast and other possible alternatives, but concluded that none of said alternatives would have effected a reasonable probability of a profitable entry for it in said New England market. In my considered opinion the plaintiff has failed to establish by a fair preponderance of the evidence that Falstaff was a potential competitor in said New England market at the time it acquired Narragansett. The credible evidence establishes that it was not a potential entrant into said market by any means or way other than by said acquisition. Consequently, it cannot be said that its acquisition of Narragansett eliminated it as a potential competitor therein." 332 F. Supp., at 972.

Also finding that the Government had failed to establish that the acquisition would result in a substantial lessening of competition, the District Court entered judgment for Falstaff and dismissed the complaint.

## I

Section 7 of the Clayton Act forbids mergers in any line of commerce where the effect may be substantially to lessen competition or tend to create a monopoly. The

section proscribes many mergers between competitors in a market, *United States* v. *Continental Can Co.*, 378 U. S. 411 (1964); *Brown Shoe Co., Inc.* v. *United States*, 370 U. S. 294 (1962); it also bars certain acquisitions of a market competitor by a noncompetitor, such as a merger by an entrant who threatens to dominate the market or otherwise upset market conditions to the detriment of competition, *FTC* v. *Procter & Gamble Co.*, 386 U. S. 568, 578–580 (1967). Suspect also is the acquisition by a company not competing in the market but so situated as to be a potential competitor and likely to exercise substantial influence on market behavior. Entry through merger by such a company, although its competitive conduct in the market may be the mirror image of that of the acquired company, may nevertheless violate § 7 because the entry eliminates a potential competitor exercising present influence on the market. *FTC* v. *Procter & Gamble Co.*, 386 U. S., at 580–581; *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158, 173–174 (1964). As the Court stated in *United States* v. *Penn-Olin Chemical Co.*, 378 U. S., at 174, "The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated."

In the case before us, Falstaff was not a competitor in the New England market, nor is it contended that its merger with Narragansett represented an entry by a dominant market force. It was urged, however, that Falstaff was a potential competitor so situated that its entry by merger rather than *de novo* violated § 7. The District Court, however, relying heavily on testimony of Falstaff officers, concluded that the company had no intent to enter the New England market except through acquisition and that it therefore could not be considered

a potential competitor in that market. Having put aside Falstaff as a potential *de novo* competitor, it followed for the District Court that entry by a merger would not adversely affect competition in New England.

The District Court erred as a matter of law. The error lay in the assumption that because Falstaff, as a matter of fact, would never have entered the market *de novo*, it could in no sense be considered a potential competitor. More specifically, the District Court failed to give separate consideration to whether Falstaff was a potential competitor in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in that market.

A similar error was committed by the Court of Appeals in *FTC* v. *Procter & Gamble Co.*, *supra*, where one of the reasons for the Commission finding the acquisition in violation of § 7 was that the merger eliminated Procter as a potential entrant, not because Procter would have entered independently, but because the acquisition eliminated the pro-competitive effect Procter exerted from the fringe of the market. *Id.*, at 575. The Court of Appeals struck down this finding because there was no evidence that Procter ever intended *de novo* entry, but we held the Commission's finding was "amply supported by the evidence," *id.*, at 581, because the evidence "clearly show[ed] that Procter was the most likely entrant," *id.*, at 580, and it was "clear that the existence of Procter at the edge of the industry exerted considerable influence on the market," *id.*, at 581. Thus the fact that Falstaff and its management had no intent to enter *de novo*, and would not have done so, does not *ipso facto* dispose of the potential competition issue.

The specific question with respect to this phase of the case is not what Falstaff's internal company decisions were but whether, given its financial capabilities and conditions in the New England market, it would be rea-

sonable to consider it a potential entrant into that market. Surely, it could not be said on this record that Falstaff's general interest in the New England market was unknown;[12] and if it would appear to rational beer merchants in New England that Falstaff might well build a new brewery to supply the northeastern market then its entry by merger becomes suspect under § 7. The District Court should therefore have appraised the economic facts about Falstaff and the New England market in order to determine whether in any realistic sense Falstaff could be said to be a potential competitor on the fringe of the market with likely influence on existing competition.[13] This does not mean that the testimony of company officials about actual intentions of the com-

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[12] See n. 8, *supra*, and accompanying text.

[13] In *FTC* v. *Procter & Gamble Co.*, 386 U. S. 568, 581 (1967), we found the acquiring company at the edge of the market exerted "considerable influence" on the market because "market behavior . . . was influenced by each firm's predictions of the market behavior of its competitors, actual and potential"; because "barriers to entry . . . were not significant" as to the acquiring company; because "the number of potential entrants was not so large that the elimination of one would be insignificant"; and because the acquiring firm was the most likely entrant.

It is suggested that the District Court Judge failed to consider whether Falstaff was an on-the-fringe potential competitor with influence on existing competition because the Government never alleged in its complaint that Falstaff was exerting a present procompetitive influence, never proceeded under this theory, and further failed to introduce any evidence to support this view. But this position merely ascribes an arbitrary meaning to the language of the complaint. The Government in its complaint alleged that the acquisition violated § 7 because it eliminated potential competition; since potential competition may stimulate a present procompetitive influence, the allegation certainly encompassed the "on-the-fringe influence" that the District Court failed to consider, and the Government was not required to be more specific in its allegation.

The Government did not produce direct evidence of how members of the New England market reacted to potential competition from

pany is irrelevant or is to be looked upon with suspicion; but it does mean that theirs is not necessarily the last word in arriving at a conclusion about how Falstaff should

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Falstaff, but circumstantial evidence is the lifeblood of antitrust law, see *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100 (1969); *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 221 (1939); *Frey & Son, Inc.* v. *Cudahy Packing Co.*, 256 U. S. 208, 210 (1921), especially for § 7 which is concerned "with probabilities, not certainties," *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 323 (1962). As was stated in *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158, 174 (1964), "potential competition cannot be put to a subjective test. It is not 'susceptible of a ready and precise answer.'"

Nor was there any lack of circumstantial evidence of Falstaff's on-the-fringe competitive impact. As the record shows, Falstaff was in the relevant line of commerce, was admittedly interested in entering the Northeast, and had among other ways, see n. 8, *supra*, made its interest known by prior acquisition discussions. Moreover, there were, as my Brother MARSHALL would put it, objective economic facts as to Falstaff's capability to enter the New England market; and the same facts which he would have the District Court judge look to in determining whether the particular theory of potential competition we do not reach has been violated, would be probative of violation of § 7 through loss of a procompetitive on-the-fringe influence. See *FTC* v. *Procter & Gamble Co.*, 386 U. S., at 580–581; *United States* v. *Penn-Olin Chemical Co.*, 378 U. S., at 173–177; *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651, 660 (1964).

And as for the contention that the Government did not proceed under this on-the-fringe influence view, the record is to the contrary. At one point in the trial the Government informed the trial judge that a deposition was being introduced into evidence "to establish that Falstaff was a company that was on the wings or at the edge of the New England market. . . . What I mean by that is that Falstaff was capable and interested in entering the New England market and would be waiting for the opportunity to develop, but that Falstaff, over the long term, would eventually or could eventually or was a likely entrant into the New England market, to use the terminology in *FTC* v. *Procter & Gamble Company*." App. 124. Further into its presentation of proof the Government was introducing evidence of the trend toward concentration in the market, and stated, "it is this concentration, your Honor, which, as we attempted

be considered in terms of its status as a potential entrant into the market in issue.

Since it appears that the District Court entertained too narrow a view of Falstaff as a potential competi-

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to point out in our pretrial brief, makes potential competition. . . . The concentration of sales within a small number of firms in New England. This is what makes the potential competition . . . so very, very important to this market. . . . In such a situation the potential entry of a fresh competitive factor is of extreme importance." App. 170.

That the on-the-fringe influence theory was one of the theories the Government was proceeding under was apparent to Falstaff. In its opening statement, Falstaff stated:

"Now the Government has a theory which is, so far as the judicial determinations on the point are concerned, comparatively new. You were handed the other day a portion of the record in FTC against the Bendix-Fram Corporation, and you were handed at the same time a typed or otherwise reproduced copy of the opinion of Commissioner Elman of the FTC in that case.

"That opinion is not yet officially reported. The case is on its way to an appeal . . . . The Commissioner announced a theory upon which the Government relies and which they say lies within the ambit of this vague, undefined creature, potential competition. What that decision, on appeal as I say, what that decision announces is the doctrine which is called the toe-hold doctrine, and it goes like this:

"If a producer of Product A is standing in the wings, as the Commissioner says, outside the market, merely standing there, but in a position to move into the market if he chooses. He must remain there in the wings and forebear acquiring the producer of a like product within the market area.

"The Commissioner fancies that the mere presence of such a manufacturer or seller close to the market area had some effect which could fall within his ill-defined concept of potential competition. And he found in Bendix-Fram that Bendix was in such a position. He found that Bendix could have acquired a small company rather than Fram, a relatively larger one, beefed it up by expenditures of money which Bendix could afford, and develop it into a full-blown competitor within the market area. I do not know whether that motion will gain substantial acceptance in the theory of antitrust law. I do not know that it will have the approval of

tor and since it appears that the District Court's conclusion that the merger posed no probable threat to competition followed automatically from the finding that Falstaff had no intent to enter *de novo*, we remand this case for the District Court to make the proper assessment of Falstaff as a potential competitor.

## II

Because we remand for proper assessment of Falstaff as an on-the-fringe potential competitor it is not necessary to reach the question of whether § 7 bars a market-extension merger by a company whose entry into the market would have no influence whatsoever on the present state of competition in the market—that is, the entrant will not be a dominant force in the market and has no current influence in the marketplace. We leave for another day the question of the applicability of § 7 to a merger that will leave competition in the marketplace exactly as it was, neither hurt nor helped, and that is challengeable under § 7 only on grounds that the company could have, but did not, enter *de novo* or through "toe-hold" acquisition and that there is less competition

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the Supreme Court if and when it ever reaches it. I do know, however, that that is an entirely different situation that we have here.

. . . . . .

*"If there is any sense to this total theory at all it must be that the acquiring company was in fact so closely located to the market served by the acquired company that its entrance into the market unilaterally, under its own steam, without motivation was a distinct threat to those who were competing in the market."* App. 182–183. (Emphasis added.)

Falstaff then proceeded to state why it felt that the on-the-fringe influence theory did not apply in this case.

During its proof, Falstaff had both its expert witness on economics, App. 257, and an officer of Narragansett, App. 376, testify as to whether Falstaff's presence had a procompetitive effect, both stating that it did not.

than there would have been had entry been in such a manner. There are traces of this view in our cases, see *Ford Motor Co.* v. *United States*, 405 U. S. 562, 567 (1972); *id.*, at 587 (BURGER, C. J., concurring in part and dissenting in part); *FTC* v. *Procter & Gamble Co.*, 386 U. S. 568, 580 (1967); *id.*, at 586 (Harlan, J., concurring); *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158, 173 (1964), but the Court has not squarely faced the question,[14] if for no other reason than because there has been no necessity to consider it. See *Ford Motor Co.* v. *United States*, *supra*; *FTC* v. *Procter & Gamble Co.*, *supra*; *United States* v. *Penn-Olin Chemical Co.*, *supra*; *United States* v. *El Paso Gas Co.*, 376 U. S. 651 (1964).

The judgment of the District Court dismissing the complaint against Falstaff is reversed, and the case is remanded for further proceedings consistent with this opinion.

*So ordered.*

MR. JUSTICE BRENNAN took no part in the decision of this case. MR. JUSTICE POWELL took no part in the consideration or decision of this case.

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[14] It is suggested that certain language in the Court's opinion in *United States* v. *Continental Can Co.*, 378 U. S. 441, 464 (1964), is to the contrary. But there the merger was held proved prima facie anticompetitive because the acquiring and acquired companies were engaged in the same overall line of commerce in the same geographic market. This notwithstanding, it is again only arbitrary to assume that the quoted language was not referring to the acquired company's on-the-fringe influence as a potential competitor for certain end uses for containers.

# SUPREME COURT OF THE UNITED STATES

No. 71-873

United States, Appellant, v. Falstaff Brewing Corporation et al. | On Appeal from the United States District Court for the District of Rhode Island.

[February 28, 1973]

MR. JUSTICE DOUGLAS, concurring in part.

Although I join Part I of the Court's opinion and its judgment remanding the case to the District Court for further proceedings consistent with the opinion, I offer the following observations with respect to the question which the Court does not reach.

There can be no question that it would be sufficient for the Government to prove its case to show that Falstaff would have made a *de novo* entry but for the acquisition of Narragansett or that Falstaff was a potential competitor exercising present influence on the market. See *Ford Motor Co.* v. *United States*, 405 U. S. 562; *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U. S. 568; *United States* v. *Penn-Olin Co.*, 378 U. S. 158; *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651. But, I do not believe that it was a prerequisite to the Government's case to prove that the acquisition had marked immediate, *i. e.*, present anticompetitve effects.

Section 7 evidences a definite concern for protecting competitive markets. It does not require "merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future . . . ." *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 362. In

*United States* v. *Penn-Olin Co.*, *supra*, at 170–171, the Court said:

> "The grand design of the original § 7, as to stock acquisitions, as well as the Celler-Kefauver Amendment, as to acquisition of assets, was to arrest incipient threats to competition which the Sherman Act did not ordinarily reach. It follows that actual restraints need not be proved. The requirements of the amendment are satisfied when a 'tendency' toward monopoly or the 'reasonable likelihood' of a substantial lessening of competition in the relevant market is shown."

Moreover, we are concerned with probabilities, not certainties. See *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 323.

Falstaff acquired Narragansett in 1965. Prior to that time, Falstaff was the largest brewer in the country that did not sell in the New England market. It had stated publicly that it wanted to become a national brewer to allow it to compete more effectively with the existing national brewers. Falstaff has conceded in its brief that "given an acceptable level of profit it had the financial capability and the interest to enter the New England beer market."

During the four years preceding 1965, beer sales in New England had increased approximately 9.5%. Nevertheless, the market had become more concentrated. In 1960, the eight largest sellers accounted for approximately 74% of the beer sales; by 1964 they accounted for 81.2%. From 1957 to 1964 the number of breweries decreased from 11 to 6. In addition, there is evidence that two of the remaining breweries were interested in being acquired. And, by Falstaff's own admission, "[a]t the time of the acquisition, the substantial growth in the market shares of the national brewers was just beginning to occur."

One of the principal purposes of § 7 was to stem the "'rising tide' of concentration in American business." *United States* v. *Pabst Brewing Co.*, 384 U. S. 546, 552. When an industry or a market evidences signs of increasing competition, we cannot allow an acquisition which may "tend to accelerate concentration." *Ibid.*; *Brown Shoe Co.* v. *United States*, *supra*, at 346.

The implications of the Clayton Act, as amended by the Celler-Kefauver Act, 15 U. S. C. § 18, are much, much broader than the customary restraints of competition and the power of monopoly. Louis D. Brandeis testified in favor of the bill that became the Clayton Act in 1914. "You cannot have true American citizenship, you cannot preserve political liberty, you cannot secure American standards of living unless some degree of industrial liberty accompanies it."[1] He went on to say[2] in answer to George W. Perkins, who testified against the bill:

> "Mr. Perkin's argument in favor of the efficiency of monopoly proceeds upon the assumption, in the first place, and mainly upon the assumption, that with increase of size comes increase of efficiency. If any general proposition could be laid down on that subject, it would, in my opinion, be the opposite. It is, of course, true that a business unit may be too small to be efficient, but it is equally true that a unit may be too large to be efficient. And the circumstances attending business to-day are such that the temptation is toward the creation of too large units of efficiency rather than too small. The tendency to create large units is great, not because larger units tend to greater efficiency, but because the owner of a business may make a great deal more

[1] Hearings, S. Committee, Interstate Commerce, S. Res. 98, 62d Cong. 1913, Vol. I, Pts. I–XVII, at 1155.

[2] *Id.*, at 1147–1148.

money if he increases the volume of his business tenfold, even if the unit profit is in the process reduced one-half. It may, therefore, be for the interest of an owner of a business who has capital, or who can obtain capital at a reasonable cost, to forfeit efficiency to a certain degree, because the result to him, in profits, may be greater by reason of the volume of the business. Now, not only may that be so, but in very many cases it is so.

"And the reason why increasing the size of a business may tend to inefficiency is perfectly obvious when one stops to consider. Anyone who critically analyzes a business learns this: That success or failure of an enterprise depends usually upon one man; upon the quality of one man's judgment, and, above all things, his capacity to see what is needed and his capacity to direct others."

That is why the Celler Committee reporting in 1971 on conglomerates and other types of mergers [3] said that "Preservation of a competitive system was seen as essential to avoid the concentration of economic power that was thought to be a threat to the nation's political and social system." [4] Control of American business is being transferred from local communities to distant cities where men on the 54th floor with only balance sheets and profit and loss statements before them decide the fate of communities with which they have little or no relationship. As a result of mergers and other acquisitions, some States are losing major corporate headquarters and their local communities are becoming satellites of a

[3] Investigation of Conglomerate Corporations Report by the Staff of Antitrust Subcommittee of the House Judiciary Committee on H. Res. 161, 92d Cong., 1st Sess.

[4] *Id.*, at 18.

distant corporate control.[5] The antitrust laws favored a recent Wisconsin study shows that "The growth of aggregate Wisconsin employment of companies acquired by out-of-state corporations declined substantially more than that of those acquired by in-state corporations."[6] In this connection the Celler Report states:[7]

> "The Wisconsin study found, also, that 53 percent of acquired companies after the merger had a slower rate of payroll growth. Payroll growth, notably in large firms acquired by out-of-State corporations, was depressed by mergers. Inflation in recent years has markedly raised wages and salaries. It would be reasonable to expect that payrolls in acquired companies, because of the inflation, would have advanced more than employment. In this connection, the report states: 'The fact that this frequently did not happen in companies acquired by out-of-state firms would lead one to believe that their acquirers have transferred a portion of the higher salaried employees to a location outside Wisconsin. Such transfers mean a loss of talent, retail expenditures, and personal income in the economies of Wisconsin's communities and the state.'"

The adverse influence on local affairs of out-of-state acquisitions has not gone unnoticed in our opinions. Thus "the ability of retaining 'local control' over industry and the protection of small business" was our comment in *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 315–316, on one of the purposes of strengthening § 7 of the Clayton Act through passage of the Celler-Kefauver Act.

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[5] *Id.*, at 52–53.
[6] *Id.*, at 53.
[7] *Id.*, at 54.

By reason of the antitrust laws efficiency in terms of the accounting of dollar costs and profits is not the measure of the public interest nor is growth in size where no substantial competition is curtailed. The antitrust laws look with suspicion on the acquisition of local business units by out-of-state companies. For then local employment is apt to suffer, local payrolls are likely to drop off, responsible entrepreneurs in counties and States are replaced by clerks.

A case in point is Goldendale in my State of Washington. It was a thriving community—an ideal place to raise a family—until the company that owned the sawmill was bought by an out-of-state giant. In a year or so auditors in faraway New York City, who never knew the glories of Goldendale, decided to close the local mill and truck all the logs to Yakima. Goldendale became greatly crippled. It is Exhibit A to the Brandeis concern which became part of the Clayton Act concern with the effects that the impact of monopoly often has on a community, as contrasted with the beneficient effect of competition.

A nation of clerks is anathema to the American antitrust dream. So is the spawning of federal regulatory agencies to police the mounting economic power. For the path of those who want the concentration of power to develop unhindered leads predictably to socialism that is antagonistic to our system. See Blake and Jones, The Goals of Antitrust: A Dialogue on Policy—In Defense of Antitrust, 65 Col. L. Rev. 376 (1965).

It is against this background that we must assess the acquisition by Falstaff, the largest producer of beer in the United States that did not sell in the New England market, of the leading seller in that market.

In *United States* v. *El Paso Natural Gas Co.*, *supra*, at 660, we indicated that "[t]he effect on competition in a particular market through acquisition of another company is determined by the nature or extent of that

market and by the nearness of the absorbed company to it, that company's eagerness to enter that market, its resourcefulness, and so on." Falstaff's president testified below that Falstaff for some time had wanted to enter the New England market as part of its interest in becoming a national brewer. And Falstaff has conceded in its brief before this Court that "given an acceptable level of profit, it has the financial capability and the interest to enter the New England beer market." With both the interest and the capability to enter the market, Falstaff was "the most likely entrant." *FTC* v. *Procter & Gamble Co.*, *supra*, at 580–581. Thus, although Falstaff might not have made a *de novo* entry if it had not been allowed to acquire Narragansett,[*] we cannot say that it would be unwilling to make such an entry *in the future* when the New England market might be ripe for an infusion of new competition. At this point of time it is the most likely new competitor. Moreover, there can be no question that replacing the leading seller in the market, a regional brewer, with a seller with national capabilities, increased the trend toward concentration.

I conclude that there is "reasonable likelihood" that the acquisition in question "may tend to substantially lessen competition." Accordingly, I would be inclined to reverse and direct the District Judge to enter judgment for the Government and afford appropriate relief. Nevertheless, since the Court will not reach this question and I agree with the legal principles set forth in Part I of its opinion, I join the judgment remanding the case for further proceedings.

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[*] Falstaff contended below that a *de novo* entry would not be profitable. Management stated that an established distribution system was a prerequisite to entry. The District Judge concluded that "[t]he credible evidence establishes that [Falstaff] was not a potential entrant into said market by any means or way other than by said acquisition."

# SUPREME COURT OF THE UNITED STATES

No. 71-873

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| United States, Appellant, v. Falstaff Brewing Corporation et al. | On Appeal from the United States District Court for the District of Rhode Island. |

[February 28, 1973]

MR. JUSTICE MARSHALL, concurring in the result.

I share the majority's view that the District Judge erred as a matter of law and that the case must be remanded for further proceedings. I cannot agree, however, with the theory upon which the majority bases the remand.

The majority accuses the District Judge of neglecting to assess the present procompetitive effect which Falstaff exerted by remaining on the fringe of the market. The explanation for this failing is rather simple. The Government never alleged in its complaint that Falstaff was exerting a present procompetitive influence,[1] it introduced not a scrap of evidence to support this view,[2] and

[1] The Government's complaint alleged that the merger violated § 7 because "[p]*otential* competition in the production and sale of beer between Falstaff and Narragansett will be eliminated." (Emphasis added.) While it is true, as the majority asserts, that "potential competition may stimulate a present procompetitive influence." See *ante*, at —, n. 13, the complaint nowhere alleges that such a procompetitive influence occurred in this case.

[2] Significantly, the majority cites no evidence at all from the record indicating that firms within the New England market were detered from anticompetitive practices by Falstaff's presence at the market fringe. Indeed, my Brethren concede that "[t]he Government did not produce direct evidence of how members of the New England market reacted to potential competition from Falstaff," *ante*, at —, n. 13. While the majority contends that there was "circumstantial evidence" relevant to determining whether there was

even at this stage of the proceedings, it seemingly disclaims reliance on this theory.[3]

Thus, our remand leaves the hapless District Judge with the unenviable task of reassessing nonexistent evidence under a theory advanced by neither of the parties. I submit that civil antitrust litigation is complicated enough when the trial judge confines his attention to the legal arguments and evidence offered by the parties and avoids investigation of hypothetical lawsuits which might have been brought.

The majority's departure from this self-evident proposition is all the more startling when one realizes that the Court eschews reliance on a well established, plainly applicable body of law in order to reach questions not

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a loss of procompetitive influence, the evidence it points to suggests only that Falstaff might have been perceived as a potential entrant—not that this perception produced a present procompetitive effect. In fact, the little evidence on the question which does appear in the record strongly suggests that Falstaff was exerting no procompetitive influence. Thus, an economist testifying for the defense stated that in his expert judgment, Falstaff's presence on the fringe of the market "had no effect" on the practices of firms within the market (App. 257). Similarly, the director of marketing for Narragansett testified that those within the market did not view Falstaff as a threat and that it never occurred to them that Falstaff would attempt a *de novo* entry (App. 376).

To be sure, this testimony may well have been biased and might properly have been discredited by the trier of fact. But it is harder to dismiss the documentary evidence showing continued vigorous competition after Falstaff's entry by acquisiton. If Falstaff was exerting a substantial procompetitive influence by threatening entry, it would seem to follow that anticompetitive practices should have emerged when this threat was removed. The majority nowhere accounts for the continuing absence of such practices.

[3] In its brief before this Court, the Government characterises its cause of action as follows:

"The theory of the suit was that *potential competition* in the New England beer market may be substantially lessened by the acquisition." Brief for the United States, at 2–3.

properly before it. As MR. JUSTICE DOUGLAS ably demonstrates, see pp. ——, *supra*, many decisions by this Court hold that § 7 is violated when a merger is reasonably likely to eliminate future or potential competition. See also pp. ——, *infra*. I know of no case suggesting that this principle is only applicable when the plaintiff can show that the merger will have present anticompetitive consequences, and the majority cites no authority for this proposition.

In the course of a nine-day trial, the Government introduced voluminous evidence to support its potential competition theory. But at the conclusion of the trial, the District Judge dismissed the Government's action in an opinion covering a scant two and one-half pages in the Federal Supplement [4] and without making any findings of fact or conclusions of law.[5] See *United States* v. *Falstaff Brewing Corp.*, 332 F. Supp. 970 (RI 1971).

The Court held that Falstaff "was not a potential entrant into said market by any means or way other than by said acquisition. Consequently it cannot be said that its acquisition of Narragansett eliminated it as a potential competitor therein." 332 F. Supp., at 972. The District Judge based this conclusion on testimony by Falstaff executive personnel that "Falstaff had consistently decided not to attempt to enter said

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[4] Cf. *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651, 663 (1964) (opinion of Harlan, J.):

"Both as a practitioner and as a judge I have more than once felt that a closely contested government antitrust case, decided below in favor of the defendant, has foundered in this Court for lack of an illuminating opinion by the District Court. District Courts should not forget that such cases, the trials of which usually result in long and complex factual records, come here without the benefit of any sifting by the Courts of Appeals. The absence of an opinion by the District Court has been a handicap in this instance."

[5] See Fed. Rule Civ. Proc. 52 (a). Cf. *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651, 656–657 (1964).

market unless it could acquire a brewery with a strong and viable distribution system such as that possessed by Narragansett." *Ibid.*

Inasmuch as the District Court grounded its dismissal on these conclusions, I think we have a responsibility to assess the validity of the legal standard from which they are derived. I would hold that where, as here, strong objective evidence indicates that a firm is a potential entrant into a market, it is error for the trial judge to rely solely on the firm's subjective prediction of its own future conduct. While such subjective evidence is probative on the issue of potential entry, it is inherently unreliable and must be used with great care. Ordinarily, the district court should presume that objectively measurable market forces will govern a firm's future conduct. Only when there is a compelling demonstration that a firm will not follow its economic self-interest may the district court consider subjective evidence in predicting that conduct. Even then, subjective evidence should be preferred only when the objective evidence is weak or contradictory. Because the District Court failed to apply these standards, I would remand the case for further consideration.

## I

Although this case ultimately turns on a point of law, it cannot be satisfactorily understood without some appreciation of the factual context in which it arises. A somewhat more detailed description of the relevant line of commerce, the relevant geographic market, and the market structure than that provided by the majority is therefore in order.

### *A. The Product Market*

The relevant product market is the production and sale of beer. The firms competing for this market can be divided into three categories: national, regional, and

local. The national firms, Anheuser-Busch, Schlitz, Pabst, and Miller, sell their product throughout the country and advertise on a national basis. In contrast, the regional firms, the largest of which are Hamm's, Carlings, Coors, Falstaff, and National Bohemian, market their beer in narrower geographical areas of varying size. Local brewers sell their product in a small area, sometimes no larger than a single State.

Originally, most of the market was held by a large number of small local and regional brewers. The high cost of transporting beer favored the local distributor in early years. But more recently, the national brewers have been able to overcome this difficulty to some extent by decentralizing their production facilities. Moreover, any remaining extra transportation costs associated with national distribution are now outweighed by the advantages of centralized management and, especially, national advertising. Thus, in recent years, while the beer market as a whole has expanded, the number of breweries has declined dramatically. See *United States* v. *Pabst Brewing Co.*, 384 U. S. 546, 550 (1966). Whereas in 1935 there were 684 brewing plants operating in the United States, by 1965 the number had been reduced to 178. Economies of scale, a relatively low profit margin, and significant barriers to market entry have all led to a concentration of beer production among the few national and large regional brewers.

### *B. The Geographic Market*

These national trends are reflected in the six New England States, which constitute the relevant geographic market. In the four years preceding Falstaff's acquisition of Narragansett, New England beer sales increased 9.5%—a substantial gain, although somewhat below the increase in national sales for the same period. At the

same time, however, the number of brewers operating plants in the region declined precipitously. Thus, in 1957, there were 11 breweries in the New England States, but by 1964 the number had declined to six, and of those six, two of the three smallest had publicly expressed an interest in merging with a larger competitor.

Not surprisingly, this decline in the number of breweries in New England was accompanied by an increase in the market shares of those selling in the region. In 1960, the eight largest participants in the New England market claimed 74% of all beer sales, and by 1964 this figure had risen to 81.2%. Examination of the four largest brewers shows that their share of the market rose from about 50% in 1960 to 54% in 1964, to 61.3% in 1965. In large part, these figures are probably explicable in terms of the nationwide trend in favor of the large national and regional brewers. Seven of the Nation's 10 largest breweries, including, of course, all the national breweries, sell beer in New England, and their share of the market has increased as the small, local brewers disappeared.

At the same time, however, the concentration of the market does not yet seem to have produced blatantly anticompetitive effects. In recent years, prices have remained fairly stable despite rising costs and competition seems relatively intense among the few large firms which dominate the market. Still, there is no doubt that the seeds of anticompetitive conduct are present, since "[a]s [an oligopolistic] condition develops the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge." *United States* v. *Aluminum Company of America*, 377 U. S. 271, 280 (1964). One commentator's description of the national beer market aptly characterizes the situation in New England: "The increasing concentration . . . and the unlikely entrance of new rivals poses a threat to the future level of competition in this industry. Thus far there is no evidence of collusion in the beer industry. But as the industry be-

comes populated by fewer and fewer companies, the possibility and likelihood will be enhanced of their engaging in tacit or direct collusion—given the inelastic nature of demand—to establish a joint profit maximizing price and output. Similarly, the chances will become slimmer that individual firms in the industry will follow a truly independent price and production strategy, vigorously striving to take sales away from rival brewers. With only a few sellers will come the increasing awareness that parallel business behavior might be feasible." Elzinga, The Beer Industry in Adams, The Structure of American Industry 213 (1971).

### *C. Narragansett—The Acquired Firm*

Narragansett is a regional brewery with only minuscule sales outside of New England. Within the New England market, however, the firm has been highly successful. Although only twenty-first in national sales and accounting for only 1.4% of the beer sales in the United States, Narragansett was the largest seller of beer in New England for the five years preceding its acquisition. In recent years, the firm has expanded steadily until, in 1964, the year before acquisition, it sold 1.275 million barrels, which was about 20% of the New England market. Net profits had increased from $417,284 in 1960 to a record level of $713,083 in 1964.

Notwithstanding this growth, Narragansett felt itself under some pressure from the national brewers.[6] The corporation was closely held by the Haffenreffer family, and the stockholders apparently concluded that it was in their interests to diversify their personal holdings by selling Narragansett.

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[6] This pressure continued during the post-acquisition period. From 1964 to 1969, Narragansett's share of the market slipped from 21.5% to 15.5%, while Anheuser-Busch and Schlitz, two large national firms, increased their combined share from 16.5% to 35.8%

### *D. Falstaff—The Acquiring Firm*

Like Narragansett, Falstaff has been highly successful in recent years. Beginning with a 100,000 barrel plant in St. Louis shortly after the repeal of Prohibition, the firm has steadily grown. By 1964, it was the Nation's fourth largest producer, marketing 5.8 million barrels, or 5.9% of the total national production.

Throughout its history, Falstaff has followed a pattern of acquiring weak breweries and expanding them so as to extend its influence to new markets. Although still a regional brewer, by 1965 the company had expanded its network of plants and distributorships over an area far larger than that in which Narragansett competed. In that year, Falstaff operated eight plants and sold its product in 32 States in the West, Midwest, and South. Sixteen of these States were added in the period after 1950. However, as of 1965, Falstaff sold virtually no beer in any of the Northeastern States, including the six comprising the New England area. Falstaff marketed its product both through company-owned branches and through some 600 independent distributorships.[7]

In the years immediately prior to its acquisition of Narragansett, Falstaff's steady pattern of growth had

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[7] At trial, Falstaff argued that it was unlikely to make a *de novo* entry into the New England market since it had learned through experience that a strong, pre-existing organization of distributors was essential to success. It is true that Falstaff sold most of its beer through independent distributors. However, it should be noted that between 20% and 25% of its sales were made through company branches which Falstaff had established itself. As might be expected, Falstaff's profit margin was significantly higher in areas where it used its own distribution facilities. Moreover, Falstaff's assertion is belied by its own prior history. As noted above, for years Falstaff had successfully expanded by purchasing failing breweries with weak distribution facilities and turning them into effective competitors.

continued. Between 1955 and 1964, its sales increased from $77 million to $139.5 million and its net profits grew from $4.3 million to $7 million. In the year before acquisition, the company announced a 10-year expansion program in which it was prepared to invest $35 million.

Yet despite this encouraging trend, Falstaff, like Narragansett, was to some extent handicapped by the competitive advantages—in particular, national advertising—enjoyed by national distributors. For years, the company had publicly expressed the desire to become a national brewer, and the logical region for market extension was the Northeast. New England seemed a particularly appropriate area to initiate expansion. As indicated above, seven of the 10 largest manufacturers already sold beer in New England, and Falstaff was the largest of the three remaining outside the market. The New England market was expanding at a healthy rate, and it appeared to be a fertile area for growth.

In 1958, Falstaff commissioned a study from Arthur D. Little, Inc., to determine the feasibility of future expansion. The Little Report, two years in the making, concluded that Falstaff should enter the northeastern market sometime within the next five years. But although it was clear that Falstaff should move into the northeast market, the method of entry was less obvious. After a careful review of cost estimates and the ratio of earnings to net worth, the Little Report recommended *de novo* entry through the construction of a new plant to serve the Northeast. The report concluded that "[t]here appears to be ample reason . . . for building rather than buying . . . [and] that major new market entrances need not be predicated on the availability of a brewery Falstaff could purchase."

Despite this analysis, Falstaff's own management personnel apparently concluded that the profit return on a

*de novo* entry would be inordinately low.[8] Falstaff argued at trial that it needed a strong, pre-existing distribution system to make a profitable entry. But cf. n. 7, *supra*. An independent economist, Dr. Ira Horowitz, testified on behalf of Falstaff that *de novo* entry would result in a 6.7% return which he characterized as "a very, very poor investment indeed." However, it should be noted that the 6.7% figure failed to account for the increment in Falstaff's profit margin which would result from its newly gained status as a national brewer with modern plants to serve the eastern part of the Nation—the very increment which provided the primary motivation for expansion in the first place. While Dr. Horowitz apparently recognized that such an increment might materialize, he stated that he was unable to estimate its size.[9] Moreover, even the 6.7% return rate compares favorably with Falstaff's actual rate of return on its Narragansett purchase, which was a mere 3.7%.

In any event, whatever the abstract merits of this dispute, it is clear that Falstaff's management personnel determined that entry by acquisition offered the preferable avenue for expansion. Beginning in 1962, the company held discussions with Liebmann, P. Ballantine & Sons,[10] Piel Brothers, and Dawsons, all of which did a significant percentage of their business in the New England market. All of these possibilities were event-

[8] At trial, Falstaff also argued that the other Little recommendations which Falstaff did follow led to disastrous consequences, that Little's estimate of construction costs were unrealistic, and that the Little Report was premised on Falstaff's penetration of the mid-Atlantic as well as the New England market.

[9] Dr. Horowitz's estimates were based on the assumption that Falstaff's profit margin would be $1.16 per barrel, which was the margin currently enjoyed by the Company. However, Anheuser-Busch and Pabst, two of the larger national breweries, both earned more than $2.50 per barrel in their modern plants.

[10] Ultimately, on March 6, 1972, Falstaff announced plans to acquire Ballantine's trademarks and tradename.

ually rejected, and in 1965, Falstaff finally settled on Narragansett as the most promising available brewery.

## II

With this factual background, it becomes possible to articulate the legal standards which should govern the resolution of this case.

### *A. The Purposes of § 7*

As is clear from its face, § 7 was designed to deal with the anticompetitive effects of excessive industrial concentration caused by the corporate marriage of two competitors. "It is the basic premise of [§ 7] that competition will be most vital 'when there are many sellers, none of which has any significant market share.'" *United States* v. *Aluminum Company of America*, 377 U. S. 271, 280 (1964).

But § 7 does more than prohibit mergers with immediate anticompetitive effects. The Act by its terms prohibits acquisitions which "may . . . substantially . . . lessen competition, or . . . tend to create a monopoly." The use of the subjunctive tense indicates that Congress was concerned with the *potential* effects of mergers even though, at the time they occur, they may cause no present anticompetitive consequences. See, *e. g.*, *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U. S. 568, 577 (1967). To be sure, remote possibilities are not sufficient to satisfy the test set forth in § 7. Despite substantial concern with halting a trend towards concentration in its incipiency, Congress did not intend to prohibit all expansion and growth through acquisition and merger. The predictive judgment often required under § 7 involves a decision based upon a careful scrutiny and a reasonable assessment of the future consequences of a merger without unjustifiable, speculative interference with traditional market freedoms. As we stated in *Brown Shoe Co.* v. *United States*, 370 U. S. 294,

323 (1962): "Congress used the words *'may be* substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were proscribed by this Act." See also *United States* v. *Pabst Brewing Co.*, 384 U. S. 546, 552 (1966); *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158, 171 (1964).

The legislative history of § 7 makes plain that this was the intent of Congress. Before 1950, § 7 prohibited only those mergers which lessened competition "between the corporation whose stock is so acquired and the corporation making the acquisition."[11] The Celler-Kefauver Amendment, added in 1950, deleted these words and provided instead that all mergers which substantially lessened competiton "in any line of commerce in any section of the country" were to be outlawed. See 64 Stat. 1126. Thus whereas before 1950, § 7 proscribed only those mergers which eliminated present, actual competition between the merging firms, the Celler-Kefauver Amendment reached cases where future or potential competition in the entire relevant market might be adversely affected by the merger.[12] "Section 7 of the Clay-

[11] The original § 7 provided in relevant part: "[N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." 38 Stat. 731–732.

[12] The legislative history of the 1950 amendment was traced in detail in our opinion in *Brown Shoe Co.* v. *United States*, 370 U. S. 294 (1962). "The deletion of the 'acquiring-acquired' test was the direct result of an amendment offered by the Federal Trade

ton Act was intended to arrest the anticompetitive effects of market power in their incipiency. The core question is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger's impact on competition, present and future . . . . The section can only deal with probabilities, not certainties. . . . And there is certainly no requirement that the anticompetitive power manifest itself in anticompetitive action before § 7 can be called into play. If the enforcement of § 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated." *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U. S. 568, 577 (1967).

### *B. Modes of Potential Competition*

Since 1950, we have repeatedly applied § 7 to cases where the merging firms competed in the same line of

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Commission. In presenting the proposed change, Commission Counsel Kelley made the following points: this Court's decisions had implied that the effect on competition between the parties to the merger was not the only test of the illegality of a stock merger; the Court had applied Sherman Act tests to Clayton Act cases and thus judged the effect of a merger on the industry as a whole; this incorporation of Sherman Act tests, with the accompanying 'rule of reason,' was inadequate for reaching some mergers which the Commission felt were not in the public interest; and the new amendment proposed a middle ground between what appeared to be an overly restrictive test insofar as mergers between competitors were concerned, and what appeared to the Commission to be an overly lenient test insofar as all other mergers were concerned. Congressman Kefauver supported this amendment and the Commission's proposal was then incorporated into the bill which was eventually adopted by the Congress. See Hearings [before Subcommittee 2 of the House Committee on the Judiciary] on H. R. 515, [80th Cong., 1st Sess.] at 23, 117–119, 238–240, 259; Hearings before the Subcommittee of the Senate Judiciary Committee on H. R. 2734, 81st Cong., 1st Sess. . . . 147" 370 U. S., at 317, n. 30.

commerce, and we have been willing to define the line of commerce liberally so as to reach anticompetitive practices in their "incipiency." See, *e. g.*, *United States* v. *Phillipsburg National Bank & Trust Co.*, 399 U. S. 350 (1970); *United States* v. *Pabst Brewing Co.*, 384 U. S. 546 (1966); *United States* v. *Aluminum Company of America*, 377 U. S. 271 (1964); *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1963); *Brown Shoe Co.* v. *United States*, 370 U. S. 294 (1962). But in keeping with the spirit of the Celler-Kefauver Amendment, we have also applied § 7 to cases where the acquiring firm is outside the market in which the acquired firm competes. These cases fall into three broad categories which, while frequently overlapping, can be dealt with separately for analytical purposes.

*1. The Dominant Entrant.*—In some situations, a firm outside the market may have overpowering resources which, if brought to bear within the market, could ultimately have a substantial anticompetitive effect. If such a firm were to acquire a company within the relevant market, it might drive other marginal companies out of business, thus creating an oligopoly, or it might raise entry barriers to such an extent that potential new entrants would be discouraged from entering the market. Cf. *Ford Motor Co.* v. *United States*, 405 U. S. 562, 567–568 (1972); *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U. S. 568, 575 (1967).[13] Such a danger is especially intense when the market is already highly

[13] To be sure, in terms of anticompetitive effects, the dominant firm's acquisition of another firm within the market might be functionally indistinguishable from a *de novo* entry, which § 7 does not forbid. But "surely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition." *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 370 (1963). Moreover, entry by

concentrated or entry barriers are already unusually high before the dominant firm enters the market.

*2. The Perceived Potential Entrant.*—Even if the entry of a firm does not upset the competitive balance within the market, it may be that the removal of the firm from the fringe of the market has a present anticompetitive effect. In a concentrated oligopolistic market, the presence of a large potential competitor on the edge of the market, apparently ready to enter if entry barriers are lowered, may deter anticompetitive conduct within the market. As we pointed out in *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158, 174 (1964): "The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market [is] a substantial incentive to competition which cannot be underestimated." From the perspective of the firms already in the market, the possibility of entry by such a lingering firm may be an important consideration in their pricing and marketing decision. When the lingering firm enters the market by acquisition, the competitive influence exerted by the firm is lost with no offsetting gain through an increase in the number of companies seeking a share of the relevant market. The result is a net decrease in competitive pressure.[14] Cf. *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651, 659–660 (1964).

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acquisition has the added evil of eliminating one firm in the market and thus increasing the burden on the remaining firms which must compete with the dominant entering firm.

[14] Thus, whereas the practical difference between entry by acquisition and entry *de novo* may be marginal in the case of a dominant entrant, see n. 12, *supra*, it is crucial in the case of a perceived potential entrant. If the perceived potential entrant enters *de novo*, its deterrent effect on anticompetitive practices remains and the total number of firms competing for market shares increases. But when such a firm enters by acquisition, it merely steps into the

*3. The Actual Potential Entrant.*—Since the effect of a perceived potential entrant depends upon the perception of those already in the market, it may in some cases be difficult to prove. Moreover, in a market which is already competitive, the existence of a perceived potential entrant will have no present effect at all.[11] The entry by acquisition of such a firm may nonetheless have an anticompetitive effect by eliminating an actual potential competitor. When a firm enters the market by acquiring a strong company within the market, it merely assumes the position of that company without necessarily increasing competitive pressures. Had such a firm not entered by acquisition, it might at some point have entered *de novo*. An entry *de novo would* increase competitive pressures within the market, and an entry by acquisition eliminates the possibility that such an increase will take place in the future. Thus, even if a firm at the fringe of the market exerts no present procompetitive effect, its entry by acquisition may end for all time the promise of more effective competition at some future date.

Obviously, the anticompetitive effect of such an acquisition depends on the possibility that the firm would

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shoes of the acquired firm. The result is no net increase in the actual competition for market shares and the removal of a threat exerting procompetitive influence from outside the market.

[11] Still, even if the market is presently competitive, it is possible that it might grow less competitive in the future. For example, a market might be so concentrated that even though it is presently competitive, there is a serious risk that parallel pricing policies might emerge sometime in the near future. In such a situation, an effective competitor lingering on the fringe of the market—what might be called a *potential* perceived potential entrant—could exert a deterrent force when anticompetitive conduct is about to emerge. As its very name suggests, however, such a firm would be still a further step removed from the exertion of actual, present competitive influence, and the problems of proof are compounded accordingly—particularly in light of the showing of reasonable probability required under § 7.

have entered *de novo* had it not entered by acquisition. If the company would have remained outside the market but for the possibility of entry by acquisition and if it is exerting no influence as a perceived potential entrant, then there will normally be no competitive loss when it enters by acquisition. Indeed, there may even be a competitive gain to the extent that it strengthens the market position of the acquired firm.[16] Thus, mere entry by acquisition would not prima facie establish a firm's status as an actual potential entrant. For example, a firm, although able to enter the market by acquisition, might, because of inability to shoulder the *de novo* start-up costs, be unable to enter *de novo*. But where a powerful firm is engaging in a related line of commerce at the fringe of the relevant market, where it has a strong incentive to enter the market *de novo*, and where it has the financial capabilities to do so, we have not hesitated to ascribe to it the role of an actual potential entrant. In such cases we have held that § 7 prohibits an entry by acquisiton since such an entry eliminates the possibility of future actual competiton which would occur if there were an entry *de novo*.

In light of the many decisions to this effect, the majority's assertion that "the Court has not squarely faced [this] question" is inexplicable. In *United States* v. *Continental Can Co.*, 378 U. S. 441 (1964), for example, the defendant argued that "the types of containers produced by Continental and Hazel-Atlas [the acquired firm] at the time of the merger were for the most part not in competition with each other and hence the merger could have no effect on competition." 378 U. S., at 462.

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[16] However, if the acquired firm is strengthened to such an extent that it upsets the market balance and drives its competitors out of the market, the acquiring firm takes on the characteristics of a dominant entrant, and the merger may therefore violate § 7 under that theory. See —, *supra*.

But MR. JUSTICE WHITE, writing for the Court, rejected that argument, holding that "[i]t is not at all self-evident that the lack of current competition between Continental and Hazel-Atlas for some important end uses of metal and glass containers significantly diminished the adverse effect of the merger on competition. Continental might have concluded that it could effectively insulate itself from competition by acquiring a major firm *not presently directing its market acquisition efforts toward the same end uses as Continental but possessing the potential to do so.*" 378 U. S., at 464 (emphasis added). The majority says it is "only arbitrary" to read this language is not referring to Hazel-Atlas' present procompetitive influence on the market. But the *Continental Can* Court said not a word about present procompetitive effects, and, indeed, made clear that it was relying on the future anticompetitive impact of the merger. The Court held for example, that "the fact that Continental and Hazel-Atlas were not substantial competitors of each other for certain end uses at the time of the merger may actually enhance the *long-run tendency* of the merger to lessen competition." 378 U. S., at 465 (emphasis added). See also *Ford Motor Co.* v. *United States*, 405 U. S. 562 (1972); *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U. S. 568 (1967); *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158 (1964); *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651 (1964).

### *D. Problems of Proof—The Role of Subjective Evidence*

Although § 7 deals with probabilities, not ephemeral possibilities, all forms of potential competition involve future events and all of them are therefore to some extent speculative and uncertain. Whether future competition will be reduced by a present merger is clearly

"not the kind of question which is susceptible of a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their 'incipiency.'" *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 362 (1963).

The unavoidable problems of proof are compounded in some cases by the relevance of subjective statements of future intent by the managers of the acquiring firm. Although not susceptible to precise analysis, the objective conditions of the market may at least be measured and quantified. But there exists no very good way of evaluating a subjective statement by the manager of a firm that the firm does or does not intend to enter a given market at some future date.

Fortunately, in two of the three forms of potential competition, such subjective evidence has no role to play. Clearly, in the case of a dominant entrant, the only issue is whether the firm's entry by acquisition will so upset objective market forces as to substantially reduce future competition. Since the firm will have already taken steps to enter the market by the time a § 7 action is filed, its statements of subjective intent are irrelevant.

Similarly, when the Government proceeds on the theory that the acquiring firm is a perceived potential entrant, testimony as to the subjective intent of the acquiring firm is not probative. The perceived potential entrant exerts a procompetitive effect because companies in the market *perceive* it as a potential entrant. The companies in the market may entertain this perception whether the perceived potential entrant is *in fact* a potential entrant or not. Thus, a firm on the fringe

of the market may exert a procompetitive effect even if it has no intention of entering the market so long as it seems to those within the market that it may have such an intention.[17] It follows that subjective testimony by the managers of the perceived potential entrant is irrelevant.[18]

However, subjective statements of management are probative in cases where the acquiring firm is alleged to be an actual potential entrant. First, management's statements that it does not intend to make a *de novo* market entry, together with its associated reasons, provide an expert judgment on the conclusions to be drawn by the trier of fact from the objective market forces. Just as the Government may introduce expert testimony to inform and guide the trial court with respect to the appropriate business judgments to be derived from the objective data, so too the defendant is entitled to present the evaluation of its own "experts" who may include its management personnel. Although such evidence from management is obviously biased and self-serving,

[17] Thus, in *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158 (1964), for example, management testified that the company had no intention of making a *de novo*, nonacquisitive entry, *id.*, at 166, and in part on the basis of this testimony, the District Court found that such an entry was unlikely, *id.*, at 173. But we rejected this finding as irrelevant to the company's status as a perceived potential entrant since "the corporation . . . might have remained at the edge of the market, continually threatening to enter," *ibid.*, and so affected competition within the market.

[18] Public statements by management that the firm does not intend to enter the market may be relevant. To the extent that such statements are believed by the firms within the market, they affect their perception of the firm outside the market as a potential entrant. But in that event, the statements of intent are admissible not to show subjective state of mind, but rather as one of the objective factors controlling the perception of the firms within the market.

it is nonetheless admissible to prove that the objective market pressures do not favor a *de novo* entry.

More significantly, management's statement of subjective intent, if believed, affects the firm's status as an actual potential entrant. As indicated above, the actual potential entrant's entry by acquisition is anticompetitive only if it eliminates some future possibility that it might have entered *de novo*. An unequivocal statement by management that it has absolutely no intention of entering the market *de novo* at any time in the future is relevant to the issue of whether the possibility of such an entry exists. After all, the character of management is itself essentially an objective factor in determining whether the acquiring firm is an actual potential entrant.

But although subjective evidence is probative and admissible in actual potential entrant cases, its utility is sharply limited. We have certainly never suggested that subjective evidence of likely future entry is *required* to make out a § 7 case. On the contrary, in *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158, 175 (1964), where the objective evidence of potential entry was strong, we said, *"Unless we are going to require subjective evidence*, this array of probability certainly reaches the prima facie stage. As we have indicated, to require more would be to read the statutory requirement of reasonable probability into a requirement of certainty. This we will not do." (Emphasis added.)

Nor do our prior cases hold that the district courts are bound by subjective statements of company officials that they have no intention of making a *de novo* entry. We have emphasized that the decision whether the acquiring firm is an actual potential entrant is, in the last analysis, an independent one to be made by the trial court on the basis of all relevant evidence properly

weighted according to its credibility. Thus, in *Federal Trade Commission* v. *Procter & Gamble Co.*, for example, managers of Procter & Gamble testified that they had no intention of making a *de novo* entry, and the Court of Appeals thought itself bound by that testimony. See 386 U. S., at 580, 585 (opinion of Harlan, J.). We reversed, holding that "[t]he evidence . . . clearly shows that Procter was the most likely entrant." *Id.*, at 580.

As these cases indicate, subjective evidence has, at best, only a marginal role to play in actual potential entrant cases. In order to make out a prima facie case, the Government need only show that objectively measurable market data favor a *de novo* entry and that the alleged potential entrant has the economic capability to make such an entry. To be sure, the defendant may then introduce subjective testimony in rebuttal, and in the rare case where the objective evidence is evenly divided, it is conceivable that extremely credible subjective evidence might tip the balance. But where objectively measurable market forces make clear that it is in a firm's economic self-interest to make a *de novo* entry and that the firm has the economic capability to do so, I would hold that it is error for the District Court to conclude that the firm is not an actual potential entrant on the basis of testimony by company officials as to the firm's future intent.[19]

[19] It might be argued that economic decisions are "inherently subjective" and that any attempt to derive objective conclusions from economic data is futile. If this observation means that different people reach different conclusions from the same objective data, then the point must, of course, be conceded. Similarly, the point is that economic predictions are difficult and fraught with uncertainty, it is well taken. As we recognized in *United States* v. *Philadelphia National Bank*, such questions are "not . . . susceptible of a ready and precise answer in most cases." 374 U. S., at 362. But although the factual controversies in § 7 cases may prove difficult to resolve, the statutory scheme clearly demands their

The reasons for so limiting the role of subjective evidence are not difficult to discern. Such evidence should obviously be given no weight if it is not credible. But it is in the very nature of such evidence that in the usual case it is not worthy of credit.[20] First, any statement of future intent will be inherently self-serving. A

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resolution. As this Court held, in response to a similar argument, years ago: "So far as the arguments proceed upon the conception that in view of the generality of the statute it is not susceptible of being enforced by the courts because it cannot be carried out without a judicial exertion of legislative power, they are clearly unsound. The statute certainly generically enumerates the character of the acts which it prohibits and the wrong which is was intended to prevent. The propositions therefore but insist that . . . it never can be left to the judiciary to decide whether in a given case particular facts came within a generic statutory provision. But to reduce the propositions, however, to this their final meaning makes it clear that in substance they deny the existence of essential legislative authority and challenge the right of the judiciary to perform duties which that department of the government has exerted from the beginning." *Standard Oil Co.* v. *United States*, 221 U. S. 1, 69–70 (1911). Section 7 by its terms requires the trial judge to make a prediction, and it is entirely possible that others may reasonably disagree with the conclusion he reaches. But a holding that the fact of such disagreement requires the judge to delegate his decision-making authority to one of the parties would strike at the heart of the very notion of judicial conflict resolution. While it may be true that different people see economic facts in different light, § 7 gives federal judges and juries the responsibility to reach *their* conclusions as to the economic facts. And "[i]f justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try." O. Holmes, The Common Law 48.

[20] The Government directs our attention to a case which dramatically illustrates the unreliable character of such evidence. When the Government challenged Bethlehem Steel's acquisition of Youngstown Steel in a § 7 proceeding, Bethlehem vigorously argued that it would never enter the Midwestern steel market *de novo*. But when the merger was disallowed, see *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (SDNY 1958), Bethlehem nonetheless elected to make a *de novo* entry. See Moody's Industrial Manual 2861 (1966).

defendant in a § 7 case such as this wishes to enter the market by acquisition and its managers know that its ability to do so depends upon whether it can convince a court that it would not have entered *de novo* if entry by acquisition were prevented. It is thus strongly in management's interest to represent that it has no intention of entering *de novo*—a representation which is not subject to external verification and which is so speculative in nature that it could virtually never serve as the predicate for a perjury charge.

Moreover, in a case where the objective evidence strongly favors entry *de novo*, a firm which asks us to believe that it does not intend to enter *de novo* by implication asks us to believe that it does not intend to act in its own economic self-interest. But corporations are, after all, profit-making institutions, and, absent special circumstances, they can be expected to follow courses of action most likely to maximize profits.[21] The trier of fact should therefore look with great suspicion

[21] It is possible to imagine a small, closely held corporation which is not solely concerned with profit maximization and which through excessive conservatism or inertia would not seize upon an opportunity to expand its profits. But such a corporation is exceedingly unlikely to become the defendant in a § 7 lawsuit. Section 7 suits of this type are triggered when a firm tries to expand its market by entering hitherto foreign territory by acquisition. A firm caught in the act of expanding by acquisition can hardly be heard to say that it is uninterested in expansion.

It it also possible that a firm might make a good-faith error as to the nature of objective market forces. Thus, even though the objective factors favor entry *de novo*, the firm's managers might *think* that the same factors are unfavorable. But as the objective evidence favoring entry becomes stronger, the possibility of good-faith error correspondingly decreases, so that if the objective forces favoring entry are clear, the chance of good-faith error becomes *de minimis*. Moreover, the mere fact that a firm is presently making a good-faith error does not demonstrate that it will continue to do so in the future. See —, *infra*.

upon a suggestion that a company with an opportunity to expand its market and the means to seize upon that opportunity will follow a deliberate policy of self-abnegation if the route of expansion first selected is legally foreclosed to it.

Thus, in most cases, subjective statements contrary to the objective evidence simply should not be believed. But even if the threshold credibility gap is breached, it still does not follow that subjective statements of future intent should outweigh strong objective evidence to the contrary. Even if it is true that management has no present intent of entering the market *de novo*, the possibility remains that it may change its mind as the objective factors favoring such entry are more clearly perceived. Of course, it is possible that management will adamantly continue to close its eyes to the company's own self-interest. But in that event, the chance remains that the stockholders will install new, more competent officers who will better serve their interests. All of these possibilities are abruptly and irrevocably aborted when the firm is allowed to enter the market by acquisition. And while it is conceivable that none of the possibilities will materialize if entry by acquisition is prevented, it is absolutely certain that they will not materialize if such entry is permitted. All that is necessary to trigger a § 7 violation is a finding by the trial court of a reasonable chance of future competition. In most cases, strong objective evidence will be sufficient to create such a chance despite even credible subjective statements to the contrary.[22]

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[22] The distinction between subjective statements of intent and objectively verifiable facts is not unknown in other areas of the law. See, *e. g.*, *Wright* v. *Council of City of Emporia*, 407 U. S. 451, 460–462 (1972); *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 227–228 (1963). Indeed, perhaps the oldest rule of evidence—that

To summarize, then, I would not hold that subjective evidence may never be considered in the context of an actual potential entrant case. Such evidence should always be admissible as expert, although biased, commentary on the nature of the objective evidence. And in a rare case, the subjective evidence may serve as a counterweight to weak or inconclusive objective data. But when the District Court can point to no compelling reason why the subjective testimony should be believed or when the objective evidence strongly points to the feasibility of entry *de novo*, I would hold that it is error for the Court to rely in any way upon management's subjective statements as to its own future intent.

## III

As indicated above, the Government failed to press the argument that Falstaff was a dominant or perceived potential entrant. Since there is virtually no evidence in the record to support either of these theories, I cannot say that the trial judge erred in rejecting them. It does appear, however, that the District Judge applied an erroneous standard in evaluating the subjective evidence relevant to Falstaff's position as an actual potential entrant and that this error infected the Court's factual determinations. I would therefore remand the cause so that a proper factfinding can be made.

The record shows that the New England market is highly concentrated with a few large firms gaining a greater and greater share of the market. Although this

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a man is presumed to intend the natural and probable consequences of his acts—is based on the common law's preference for objectively measurable data over subjective statements of opinion and intent. Nor have we hesitated to apply this principle to antitrust law. See, *e. g., Utah Pie Co.* v. *Continental Baking Co.*, 386 U. S. 685, 702–703 (1967); *United States* v. *Gypsum Co.*, 333 U. S. 364, 394 (1948).

market structure has yet to produce overtly anticompetitive behavior, there is a real danger that parallel pricing and marketing policies will soon emerge if new competitors do not enter the field.

The objective evidence in the record strongly suggests that Falstaff had both the capability and the incentive to enter the New England market *de novo*. It is undisputed that it was in Falstaff's interest to gain the status of a national brewer in the near future and that New England was a logical area to begin its expansion. Indeed, Falstaff's own actions in entering the New England market support this conclusion. Nor can it be doubted that Falstaff had the economic capability to enter New England. Falstaff is the Nation's fourth largest brewer and the largest still outside of New England. It has been consistently profitable in recent years, has an excellent credit rating, and had, in 1964, enough excess capital to finance a 10-year, $35 million expansion project. The Little Report concluded that *de novo* entry into the Northeast was feasible and, although Falstaff attacks these findings, the trier of fact might well have accepted them had he relied upon the objective evidence.

To be sure, Falstaff introduced a great deal of evidence tending to show that entry *de novo* would have been less profitable for it than entry by acquisition. I have no doubt that this is true. Indeed, if it can be assumed that Falstaff is a rational, profit-maximizing corporation, its own decision offers strong proof that entry by acquisition was the preferable alternative. But the test in § 7 cases is not whether anticompetitive conduct is profit-maximizing. The very purpose of § 7 is to direct the profit incentive into channels which are procompetitive. Thus, the proper test is whether Falstaff would have entered the market *de novo* if the pref-

erable alternative of entry by acquisition had been denied it. The objective evidence strongly suggests that such an entry would have occurred.

The District Court, however, chose to ignore this objective evidence almost totally. Instead, the trial judge seems to have considered himself bound by Falstaff's subjective representations that it had no intention of entering the market *de novo*. As noted above, even if these subjective statements are credible, they appear to be insufficient to outweigh the strong objective evidence to the contrary.

Findings of fact are, of course, for the trial judge in the first instance, and even in antitrust cases where the evidence is largely documentary, appellate courts should be reluctant to set them aside. But when the facts are found under a standard which is legally deficient, the situation is fundamentally different. It is the duty of appellate courts to establish the legal standards by which the facts are to be judged. The facts in this case were judged by a wrong standard, and the cause should therefore be remanded for a new, error-free determination.

# SUPREME COURT OF THE UNITED STATES

No. 71-873

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| United States, Appellant, v. Falstaff Brewing Corporation et al. | On Appeal from the United States District Court for the District of Rhode Island. |

[February 28, 1973]

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART concurs, dissenting.

Civil litigation in our common law system is conducted within the framework of the time-honored principle that the plaintiff must introduce sufficient evidence to convince the trier of fact that his claim for relief is factually meritorious. However large the societal interest in the area of antitrust law, so long as Congress assigns the vindication of those interests to civil litigation in the federal courts, antitrust litigation is no exception to that rule. The plaintiff, whether public or private, must prove to the satisfaction of the judge or jury that the defendant violated the antitrust laws. *United States* v. *Yellow Cab Co.*, 338 U. S. 338 (1949). It is the exclusive responsibility of the trier of fact to weigh, as he sees fit, all admissible evidence in resolving disputed issues of fact, *ibid.*, and his findings of fact cannot be overturned on appeal unless "the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 338 U. S. 364, 395 (1948). Cf. *FTC* v. *Procter & Gamble Co.*, 386 U. S. 568 (1967). The Court today simply disregards these principles.

The Court remands this case to the District Court to consider "whether Falstaff was a potential competitor in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive

conditions in that market." *Ante*, at —. The anti-trust theory underlying the remand is that the competitors in the relative geographic market, aware of Falstaff's presence on the periphery, would not exercise their ostensible market power to raise prices because of the possibility that Falstaff, sufficiently tempted by the high prices in that market, would enter. A Government suit challenging a merger or acquisition can, of course, be premised on this theory, and, if sufficient evidence to convince the trier of fact is introduced, the determination that the merger or acquisition violated § 7 would not be reversed on appeal.

As my Brother MARSHALL convincingly demonstrates, however, in this case the Government neither proceeded on the theory advanced by the Court nor introduced *any* evidence that would support that theory. The theory that the Government did advance, and upon which it offered its evidence, is concisely summarized in the Government's statement in opposition to Falstaff's motion to dismiss:

> "In our opening statement we attempted to show that the Government would prove—and I believe we have—that Falstaff, the fourth largest brewing corporation in the nation, had a continuous intensive interest in entering New England; that it carried on negotiations for five years with companies serving New England; that alternative methods of entry other than the acquisition of the largest New England brewer were available to Falstaff; and that it was in fact one of a few and the most likely entrant into this market; that its entrance into this market was especially important because the market is concentrated; that is, the sales of beer in New England are highly concentrated in the hands of the relatively few number of brewers.

"The entry by Falstaff by building a brewery, by shipping into this market, and opening it up, by the acquisition of a company less than number 1, thereby eliminating its most significant potential competition, were all available to it. Because of the concentration in the market and because of Falstaffs being the most important entrant, the acquisition by Falstaff of the leading firm in this market eliminated what we consider to be one of a few potential competitive effects that this market could expect for years." Transcript, Volume 3, at 7.

For this Court to reverse and to remand for consideration of a possible factual basis for a theory never advanced by the plantiff is a drastic and unwarranted departure from the most basic principles of civil litigation and appellate review. In this case the Government originally advanced one theory, but failed to introduce sufficient evidence to convince the trier of fact. That failure is "a not uncommon form of litigation casualty, from which the Government is no more immune than others." *United States* v. *Yellow Cab Co., supra,* at 341. The Court now resuscitates this "casualty" by use of a theory transplant, allowing the Government a second opportunity to vindicate its position by arguing a different theory not originally propounded before the District Court or on appeal. I cannot join in the Court's rescue operation for this "litigation casualty," an operation which succeeds only by flagrantly disregarding some of the axioms upon which our judicial system is founded.

Although agreeing with my Brother MARSHALL's criticism of the Court's reason for remanding this case, I cannot agree with his grounds for remanding to the District Court for reconsideration. That theory is based, erroneously I believe, on the notion that there is an

identifiable difference between "objective" and "subjective" evidence in an antitrust case such as this. My Brother MARSHALL would have the District Court weigh "objective" evidence more heavily than "subjective" evidence. In the field of economic forecasting in general, and in the area of potential competition in particular, however, the distinction between "objective" and "subjective" evidence is largely illusory. It is, I believe, incorrect to state that a trier of fact can determine "objectively" what "is in a firm's economic self-interest." Such a determination is guesswork. The term "economic self-interest" is a convenient shorthand for describing the economic decision reached by an individual or firm, but does not connote some simple, mechanical formula which determines the input values, or their assigned weight, in the process of economic decisionmaking. The simple fact is that any economic decision is largely subjective. In the instant case, Falstaff sought to prove why it was not in the "economic self-interest" of that firm to enter a new geographic market without an established distribution system. Its explanation is as "objective" as any of the evidence offered by the Government to show why a hypothetical Falstaff should enter the market. The question of who is an "actual potential competitor" is entirely factual. In deciding questions of fact, it is the province of the trier to weigh all of the evidence; but it is peculiarly his province to determine questions of credibility.

> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. . . . There is no exception [to the clearly erroneous rule of appellate review] which permits [the government], even in an antitrust case, to come to this Court for what virtually amounts to a

trial *de novo* on the record of such findings as intent, motive and design." *United States* v. *Yellow Cab Co.*, *supra*, at 341–342.

I would not ignore our prior decisions or rewrite the rules of evidence simply to afford the Government a second chance, which is uniformly denied to other litigants, to convince the trier of fact.